91-1925

(1)

Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1991

CITY OF ROCKLIN, THE ROCKLIN MOBILE HOME RENT REVIEW COMMISSION; CARLOS URRUTIA; RUSTY SELIX; RUDOLF MICHAELS; GEORGE PARAS,

Petitioners,

v.

SIERRA LAKES RESERVE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a mobile home rent control ordinance, similar to the rent control ordinance recently upheld in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), amounts to a *physical* taking of property for which just compensation is due.

LIST OF PARTIES

The Petitioners in this case are the defendants: The City of Rocklin; The Rocklin Mobile Home Rent Review Commission; Carlos Urrutia, City Manager of the City of Rocklin; Rusty Selix, a mediator for the Rocklin Mobile Home Rent Review Board; Rudolph Michaels, an arbitrator for the Rocklin Mobile Home Rent Review Board, and George Paras, an arbitrator for the Rocklin Mobile Home Rent Review Board.

Plaintiff/respondent Sierra Lakes Reserve is a California General Partnership which owns Sierra Lakes Reserve Adult Mobilehome Park.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Rocklin, et al. (hereinafter collectively the "City") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 9, 1991.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported at 938 F.2d 951 (9th Cir. 1991), and is

included in the Appendix to Petition for Certiorari ("App. to Pet. for Cert."), p. A1, infra. An unpublished order by the Ninth Circuit denying a petition for rehearing on February 3, 1992 is also included in the App. to Pet. for Cert., p. A23, infra.

The Order of the United States District Court for the Eastern District of California has not been reported. It is reprinted in the App. to Pet. for Cert., p. A24, infra.

JURISDICTION

The Ninth Circuit rendered its opinion and entered judgment on July 9, 1991 and denied rehearing on February 3, 1992. This petition is filed within 90 days of the latter date.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

The City of Rocklin Mobile Home Rent Mediation and Arbitration Ordinance No. 529, codified in Rocklin Municipal Code Chapter 2.46, and set forth in the App. to Pet. for Cert. at p. A58, infra.

STATEMENT OF THE CASE

Sierra Lakes Reserve ("Sierra Lakes") is the owner of a mobile home park located in the City of Rocklin. Sierra Lakes challenges the enactment and application of three successive mobile home rent control ordinances enacted by the City of Rocklin: Ordinance No. 410, Ordinance No. 472, and Ordinance No. 529. Ordinance No. 529, the primary object of Sierra Lakes' complaint permits park owners to increase rents only under certain specified circumstances. Sierra Lakes filed its complaint challenging the City's mobile home rent control on September 23, 1987.

Sierra Lakes' complaint alleges, *inter alia*, that, because Ordinance No. 529 keeps rents at below market value without controlling tenants' rights to sell their mobile homes or sublet their rented spaces at a premium and because state law permits mobile home tenants to remain in these spaces unless good cause is shown, the City has effected a transfer of possessory interests in property from Sierra Lakes to its tenants. According to Sierra Lakes, this constitutes a physical taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. App. to Pet. for Cert., pp. 21-22.

In addition to its taking claim, the complaint further alleged a deprivation of Sierra Lakes' due process and equal protection rights in violation of 42 U.S.C. section 1983. Sierra Lakes also asserted pendant state claims for inverse condemnation and misrepresentation. Sierra Lakes' complaint sought damages as well as declaratory relief.

On December 21, 1987, the City filed a motion to dismiss Sierra Lakes' complaint in full. The district court granted City's motion to dismiss on February 13, 1989. In ruling on the motion, the district court found that Sierra Lakes had sufficiently pled a claim for inverse condemnation based on a physical occupation of property relying on Ninth Circuit precedent found in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987). However, the district court ruled that this claim was not ripe for review because Sierra Lakes had failed to seek just compensation through available state procedures prior to bringing a federal claim. App. to Pet. for Cert., pp.A34, A38-39. The district court also found that Sierra Lakes had failed to state a procedural due process claim, equal protection claim or a claim for declaratory relief. Id at pp. A39-A56.

Sierra Lakes appealed this ruling to the Ninth Circuit Court of Appeals which reversed the district court's ruling. The Ninth Circuit found first that Sierra Lakes' allegations could sustain a claim for a "physical taking," reaffirming its decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), cert. denied 485 U.S. 940 (1988). *Sierra Lakes Reserve v. City of Rocklin*, 938 F.2d at 954. The Ninth Circuit also concluded that Sierra Lakes' takings claim was ripe for review. The Ninth Circuit found that California state courts of appeal consistently rejected the doctrine espoused in *Hall* thereby demonstrating Sierra Lakes' inability to obtain just compensation under any circumstances. The Ninth Circuit relied predominantly on *Yee v. City of Escondido*, 224 Cal.App.3d 1349 (1990) as support for this conclusion. *Id* at 955.

The Court also reversed the district court rulings regarding Sierra Lakes' substantive due process and

equal protection claims. The Ninth Circuit remanded to the district court for further proceedings consistent with its opinion.

On July 24, 1991, the City of Rocklin filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On February 3, 1992, the Ninth Circuit denied the City of Rocklin's request for rehearing. In its order denying rehearing, the court also ordered the district court in the first instance to address statute of limitations defenses raised by City in its appellate brief but not addressed in the Ninth Circuit opinion. App. to Pet. for Cert., p. A18.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Is Contrary To This Court's Recent Decision In *Yee v. City of Escondido* Which Rejected The Argument That Enactment of Mobile Home Rent Control Constitutes a Physical Taking

The United States Supreme Court may grant a petition for writ of certiorari when a United States Court of Appeals has decided a federal question in a way that conflicts with Supreme Court precedent. Supreme Court Rules, Rule 10.1(c). In the instant case, the Ninth Circuit has decided a question of federal law – application of the Fifth Amendment to mobile home rent control – in a manner contrary to this Court's recent decision in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992).

Petitioners will only briefly restate the facts and holding of a case so recently before this Court. In *Yee* mobile home park owners challenged a mobile home rent

control ordinance nearly identical to the one challenged in the present case. The challenge was "predicated on the unusual economic relationship between [mobile home] park owners and mobile home owners." *Yee v. City of Escondido*, 112 S.Ct. at 1528. The City of Escondido mobile home rent control ordinance set rents at a certain level and allowed for increases only under certain specified circumstances. At the same time, California's Mobile Home Residency Law (Cal. Civ. Code § 798) restricted the basis for eviction of mobile home park renters. *Id.* at 1526.

The park owners in *Yee* claimed that such a regulatory scheme operated to transfer a discrete interest in the property from the park owner to the mobile home owner. According to the park owners this transference was no less than a right of physical occupation of the park owner's land. *Id.* at 1528. The park owners had patterned their claims almost entirely upon the holding in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir 1987), the first such decision to find that a mobile home rent control ordinance could constitute a physical taking. *Id* at 1527.

This Court soundly rejected the park owners' argument, along with the holding in *Hall*. This Court found that the ordinance, although it may effect a transfer of wealth from landlord to tenant, does not constitute a physical occupation of the mobile home park, either directly by the city, or by the tenants through the city's mandate *Id.* at 1529-1530. As this Court concluded: "The Escondido rent control ordinance, even considered against the backdrop of California's Mobilehome Residency Law, does not authorize an unwanted physical occupation of petitioner's property. It is a regulation of

petitioners' *use* of their property, and thus does not amount to a *per se* taking." *Id.* at 1531 (emphasis in the original).

II. A Writ of Certiorari Is Necessary To Reverse A Decision Contrary to Supreme Court Precedent.

The conflict between *Yee* and the instant case is apparent. By re-affirming its holding in *Hall v. City of Santa Barbara*, the Ninth Circuit in the instant case has once again determined that a mobile home rent control ordinance may effect a physical taking of property entitling the property owner to just compensation under the Fifth Amendment. *Sierra Lakes Reserve v. City of Rocklin*, 938 F.2d at 954. However, this is no longer a valid principle of federal takings jurisprudence. *Yee* unequivocally holds that mobile home rent control does not amount to a physical taking under the Fifth Amendment. *Yee*, 112 S.Ct. at 1531.

The Ninth Circuit has decided a federal question in direct conflict with this Court's recent decision in *Yee v. City of Escondido*. Issuance of a writ of certiorari is imperative to resolve this manifest and intolerable conflict.

CONCLUSION

This Court's intervening ruling in *Yee v. City of Escondido* is in direct conflict with the Ninth Circuit's decision in the instant case and compels reexamination of this non-conforming decision. Accordingly, this petition for a writ of certiorari should be granted, the decision of the

Ninth Circuit vacated, and the case remanded to be reconsidered in light of this Court's recent decision in *Yee v. City of Escondido*.

Respectfully submitted,

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May 1, 1992

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City of Rocklin, The Rocklin Mobile Home Rent Review Commission; Carlos Urrutia; Rusty Selix; Rudolf Michaels; George Paras,
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v.

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Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA LAKE RESERVE, *Plaintiff-Appellant.* v. THE CITY OF ROCKLIN; THE ROCKLIN MOBILE HOME RENT REVIEW COMMISSION; CARLOS URRUTIA; RUSTY SELIX; RUDOLF MICHAELS; GEORGE PARAS, *Defendants-Appellees.*	No. 89-15371 D.C. No. CV-87-1347-LKK OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Chief District Judge, Presiding

Argued and Submitted
August 15, 1990 – San Francisco, California

Filed July 9, 1991

Before: Alfred T. Goodwin, Alex Kozinski and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Kozinski; Concurrence by
Judge Goodwin

SUMMARY

Constitutional Law

Reversing and remanding a district court judgment, the court of appeals held that a mobile home rent control ordinance, as applied, resulted in a physical taking of private property.

Appellant Sierra Lake Reserve, a mobile home park owner, filed suit against the City of Rocklin alleging due process and equal protection violations. Sierra Lake argued that Rocklin's rent control ordinances effected a taking of its property without just compensation. An adopted rent control ordinance effectively cancelled Sierra Lake's previous rent increase. Under a subsequent ordinance, recovery of capital expenditures was limited to reasonable expenditures. Lake Sierra's complaint also alleged that the vacancy control provision common to all the rent control ordinances effected a taking for which just compensation was due. The district court dismissed all of Sierra Lake's claims without leave to amend.

[1] In *Williamson*, the Supreme Court held that a takings claim cannot be presented in federal court if the state courts are available to provide compensation. Thus, unless plaintiff can show that the state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances, California procedures are adequate within the terms of *Williamson*. **[2]** At the time of the alleged taking, California state courts consistently took a dim view of takings claims based on rent control ordinances. Even when they found a rent control ordinance unconstitutional, the remedy they granted was invalidation

rather than compensation. [3] The court accepted *Oceanside, Yee,* and *Casella* as correct statements of California law, there being no contrary authority. Thus, Sierra Lake did not rely on the mere generalized hostility of the state courts to takings claims, but instead on its demonstrated inability to obtain just compensation through an inverse condemnation action under any circumstances. Therefore, the district court erred in dismissing the takings claim.

[4] In a claim for violation of procedural due process, plaintiff must show that a protected property interest was taken and that the procedural safeguards surrounding the deprivation were inadequate. [5] Sierra Lake first claimed a property interest in the rent increases allowable under the predecessors to Ordinance 529 on account of expenditures made for capital improvements to the rent controlled property. Under this theory, the deprivation resulted from the action of the City in passing such ordinance and making it retroactive. [6] Second, Sierra Lake claimed that even if it had no vested property rights at the time it spent the money for capital improvements, such rights vested when Sierra Lakes attempted to file its application for a rent increase, before such ordinance went into effect. Under this theory, it was the action of the City Manager in wrongfully rejecting the rent increase application, and his directive that the application not be refiled until the new law passed, that caused the alleged deprivation. [7] Finally, Sierra Lake claimed a property interest in one-months' cost-of-living rent increase under the ordinance. That rejection, according to Sierra Lake, resulted in a one-month delay in the approval of the rent increase, costing it a month's higher rent to which it was otherwise entitled.

[8] Sierra Lake's first theory simply failed to state a claim for procedural due process. When the action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law. **[9]** Sierra Lake's second and third theories, although involving different alleged property interests, both hinged upon a claim that the City Manager treated plaintiff's application wrongfully and arbitrarily, depriving it of a property right that had vested under state law. Since the Supreme Court held in *Zinermon* that substantive due process claims are not subject to diversion to state court under *Parrat*, elsewhere the court did not need to consider whether the procedural due process claims, standing alone, would have to be so diverted.

[10] To establish a violation of substantive due process, Sierra Lakes must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. **[11]** Given that Sierra Lake could state a substantive due process claim, the district court erred in dismissing without leave to amend. **[12]** Sierra Lake could also have a substantive due process claim to the extent it complained that Ordinance 529 deprived it of a fair and reasonable return on its investment by denying it rent increases on account of capital improvements made prior to its enactment and by limiting the amount it could recover on account of later-made improvements. **[13]** To the extent Sierra Lake alleged that the rent increases allowed on account of capital improvements merely offset the cost of those improvements, it stated a claim for a violation of substantive due process.

[14] However, Sierra Lake could not prevail on its substantive due process violation based on the enactment of the vacancy control provision of the ordinance. To prevail on this claim, Sierra Lakes had to show that no rational relationship existed between the vacancy control provision and the purpose of the ordinance. **[15]** In addition, because Sierra Lake's equal protection claim was identical to its first substantive due process claim, the court reversed the district court for the same reasons.

Concurring, Judge Goodwin stated that although he applauded the result of the decision, he was disturbed by the method.

COUNSEL

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Michelle Marchetta Kenyon, McDonough, Holland & Allen, Sacramento, California, for the defendants-appellees.

OPINION

KOZINSKI, Circuit Judge:

Sierra Lakes, a mobile home park owner, alleges that the City of Rocklin's rent control ordinances had effected a taking of its property without just compensation; plaintiff also complains of due process and equal protection violations in connection with the passage and implementation of the ordinances.

We consider whether plaintiff's taking claim is ripe for adjudication in federal court despite its failure to exhaust state judicial remedies, and whether the district court properly dismissed Sierra Lakes' procedural due process and equal protection claims. We also consider whether plaintiff adequately pleaded a substantive due process claim and, if so, whether it was properly dismissed without leave to amend.

Facts

Sierra Lakes bought a mobile home park in the City of Rocklin in late 1978, at a time when no rent control was in effect. On September 1, 1979, Sierra Lakes raised its rents to cover the cost of improvements. On November 5, the City imposed rent control on Rocklin mobile home parks and set all rents at their July 1979 level – effectively cancelling Sierra Lakes' September rent increase.

Sierra Lakes continued to make capital improvements and, on October 16, 1984, applied for a rent increase under Ordinance No. 472, the rent control ordinance then in effect. The Rocklin City Manager rejected the application[1] and advised Sierra Lakes to refile under a new rent control ordinance, soon to be enacted.

On April 1, 1985, the City replaced Ordinance No. 472 with Ordinance No. 529. Whereas previous ordinances provided that mobile home park owners could recover all capital expenditures, the new ordinance limited recovery to *reasonable* expenditures. Expenditures on

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[1] Sierra Lakes alleges that the rejection was "wrongful[ ]." CR 1, Complaint at 4.

work completed within the last twelve months were presumed to be reasonable; previously incurred expenditures were subject to review for reasonableness. On August 30, 1985, Sierra Lakes refiled its rent increase application under the new ordinance. The City Manager rejected this application because Sierra Lakes had not indicated the place of execution.[2] The City Manager refused to allow Sierra Lakes to cure the defect, even though the application form contained no blank space for indicating the place of execution.

Sierra Lakes refiled the application on September 30. The City Manager accepted this application and referred it to mediation. The rent increase finally became effective on December 1, 1985.

Sierra Lakes field suit in district court on September 23, 1987, alleging due process and equal protection violations. In addition, the complaint alleged that the vacancy control provision common to all the City's rent control ordinances effected a taking for which just compensation was due. This provision limited the amount by which Sierra Lakes could increase the rent following a vacancy at the park. According to Sierra Lakes, this transferred an interest in the rented premises from landlord to tenant, an interest departing tenants were able to monetize by

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[2] Sierra Lakes alleges that the City Manager also rejected the application on "non-statutory grounds . . . unilaterally and arbitrarily imposed by the city manager himself." Brief for Appellant at 7.

selling their mobile homes at a premium.[3] The district court granted defendants' motion under Fed. R. Civ. P. 12(b)(6), dismissing all of Sierra Lakes' claims without leave to amend.

Discussion

We review the district court's dismissal of plaintiff's claims de novo. We take all material allegations of the non-moving party as true and construe them in the light most favorable to that party. "In this type of action, where the property owner contends that it has been unconstitutionally deprived of property through governmental regulation, motions to dismiss and motions for summary judgment must be viewed with particular skepticism. The importance of the specific facts and circumstances relating to the property and the facts and circumstances relating to the governmental action militate against summary resolution in most cases." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, No. 88-1593, slip op. at 15259, 15282 (9th Cir. Dec. 12, 1990) (citation omitted).

I. Takings Claim

Plaintiff claims that the rent control ordinance resulted in an unconstitutional taking of its property. The

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[3] Despite their name, mobile homes are not all that mobile. Thus, when a tenant sells his mobile home, the home remains on the rent-controlled space, resulting in a higher price to the buyer than a home on a space not subject to rent control. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1273-74 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

facts of this case are almost identical to those of *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988). In *Hall*, we found that a physical taking could result where "the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he sells his mobile home." 833 F.2d at 1276. Here, as in *Hall*, the plaintiff alleges that a rent control ordinance has operated to transfer a valuable possessory interest in the property from the landlord to the tenant, and the tenant is able to capture a premium to which the landlord would otherwise be entitled.

[1] While recognizing that the complaint stated a takings claim under Ninth Circuit law, the district court found the claim unripe under *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson*, the United States Supreme Court held that a takings claim cannot be presented in federal court if the state courts are available to provide compensation: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. Interpreting *Williamson*, we have held that, if state law was "unclear or undeveloped" at the time of the alleged taking, plaintiff must first try to recover in state court. *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988). Thus, unless plaintiff can show that "the state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances,

[California] procedures are adequate within the terms of *Williamson County.*" *Id.* at 681.

[2] At the time of the alleged taking, California state courts consistently took a dim view of takings claims based on rent control ordinances. *See, e.g., Fisher v. City of Berkeley,* 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd,* 475 U.S. 260 (1986); *Nash v. City of Santa Monica,* 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984), *appeal dismissed,* 470 U.S. 1046 (1985); *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976). Even when they found a rent control ordinance unconstitutional, the remedy they granted was invalidation rather than compensation. *See, e.g., Gregory v. City of San Juan Capistrano,* 142 Cal. App. 3d 72, 191 Cal. Rptr. 47 (1983).[4]

More germane to our case, the state appellate courts have explicitly rejected compensation under the theory we adopted in *Hall.* In *Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside,* 157 Cal. App. 3d 887, 204 Cal. Rptr. 239 (1984), a group of mobile home park owners challenged the vacancy control aspect of a rent control ordinance because it allowed tenants to sell their mobile

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[4] The Supreme Court has since held that compensation is required for losses incurred while an invalid regulation was in effect. *See First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 318-19 (1987). The relevant date for an inquiry as to the status of the state law, however, is the time of the taking. *See Williamson,* 473 U.S. at 194; *Del Monte Dunes,* No. 88-1593, slip op. at 15280 (holding ripe a claim for a pre-1987 taking because prior to *First English,* "California law did not permit landowners to seek compensation for a regulatory taking through an action in inverse condemnation").

homes at a premium. The court viewed the claim as a regulatory challenge and rejected it, stating that "[t]he ordinance is structured to establish a fair base rent which reflects general market conditions. . . . Rents will not be 'reduced more than required for the purposes of the police power.' " *Id.* at 907.

[3] Two recent state court opinions have refused to follow our decision in *Hall. Yee v. City of Escondido,* 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990); *Casella v. City of Morgan Hill,* No. H006972, 91 Daily Journal D.A.R. 5577 (May 10, 1991). These courts considered physical takings challenges to mobile home rent control ordinances that were virtually identical to those in *Oceanside* and *Hall.* In *Yee,* the court "reviewed the issue anew in light of *Hall,*" and found "*Hall's* reasoning unpersuasive and reaffirm[ed] the conclusion . . . reached in *Oceanside.*" *Yee,* 224 Cal. App. 3d at 1351. Similarly, the *Casella* court "repudiate[d] *Hall's* attempt to bootstrap a mobile home rent control ordinance – an economic regulation – to the Supreme Court's 'very narrow' holding in *Loretto.*" *Casella,* 91 D.A.R. at 5579. We accept *Oceanside, Yee* and *Casella* as correct statements of California law, there being no contrary authority. Thus, plaintiff does not rely on the "mere generalized hostility of the state courts to takings claims," *Schnuck v. City of Santa Monica,* No. 89-55283, slip op. at 6877, 6883 (9th Cir. June 4, 1991), but instead on its demonstrated inability to "obtain just compensation through an inverse condemnation action under any circumstances." *Austin,* 840 F.2d at 681. The district court erred in dismissing plaintiff's takings claim.[5]

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[5] Contrary to the suggestion in the concurrence, the substantive issue decided in *Hall v. City of Santa Barbara* is not

(Continued on following page)

II. The Remaining Claims

Noting that "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon v. Burch*, 110 S. Ct. 975, 982 (1990), the Supreme Court divided the universe of section 1983 claims into three categories. The first consists of claims under an express constitutional provision that by its terms prohibits some state action. In such cases, the violation occurs and becomes actionable at the time of injury. *Id.* at 983. The second category consists of claims under the "substantive component [of the Due Process Clause] that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327 (1986)). Substantive due process claims, like claims for violations of express constitutional provisions, arise at the time of the violation; a plaintiff "may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights." *Id.; see also Shah v. County of Los Angeles*, 797 F.2d 743 (9th Cir. 1986). We discuss plaintiff's substantive due process claims at pp. 8474-76 *infra*. The final category consists of procedural due process claims. In these cases, the violation does not occur and is therefore not actionable "unless and until the State fails to

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(Continued from previous page)

before us. We note, however, that the only other circuit to address this issue reached the same result after interpreting the same Supreme Court cases as we did in *Hall*. *See Pinewood Estates v. Barnegat Township Leveling Bd.*, 898 F.2d 347, 353-54 (3d Cir. 1990).

provide due process." *Zinermon*, 110 S. Ct. at 983. We discuss plaintiff's procedural due process claims immediately below.

A. Procedural Due Process

[4] A claim for violation of procedural due process has two components. First, plaintiff must show that a protected property interest was taken. Second, it must show that the procedural safeguards surrounding the deprivation were inadequate. *See Board of Regents v. Roth*, 408 U.S. 564, 568-69 (1972).

[5] Plaintiff first claims a property interest in the rent increases allowable under the predecessors to Ordinance 529 on account of expenditures made for capital improvements to the rent controlled property. As noted, prior to Ordinance 529 all expenditures on capital improvements could be recovered through rent increases, whereas under Ordinance 529 expenditures on work completed more than 12 months prior to the application have to be adjudged reasonable by mediators, subject to review by arbitrators. Plaintiff claims that it incurred a variety of expenditures in reliance on prior law, and that its property interest was diminished or impaired when the law was changed retroactively so as to deny it rent increases justified by expenditures already incurred. Under this theory, the deprivation resulted from the action of the City in passing Ordinance 529 and making it retroactive.

[6] Second, plaintiff claims that even if it had no vested property rights at the time it spent the money for capital improvements, such rights vested when Sierra

Lakes attempted to file its application for a rent increase, before Ordinance 529 went into effect. Plaintiff claims its application was wrongfully rejected by the City Manager who told Sierra Lakes to refile after the new ordinance went into effect. Under this second scenario it was the action of the City Manager in wrongfully rejecting the rent increase application, and his directive t' at the application not be refiled until the new law was passed, that caused the alleged deprivation.

[7] Finally, Sierra Lakes claims a property interest in one-month's cost-of-living rent increase under Ordinance 529.[6] According to Sierra Lakes, it presented a properly filled out application under Ordinance 529 on August 30, 1985, but the City Manager rejected it for arbitrary and insubstantial reasons. *See* note 2 *supra*. The rejection, according to Sierra Lakes, resulted in a one-month delay in the approval of the rent increase, costing it a month's higher rent to which it was otherwise entitled.

[8] As to plaintiff's first theory, it simply fails to state a claim for procedural due process. Even assuming that plaintiff had a vested interest in the rent increases allowed by prior law, it received all the process due it when the City's elected officials discharged their legislative responsibilities in the manner prescribed by law. While plaintiff may challenge legislative action on substantive grounds or demand compensation if the action amounts to a taking, it may not raise a procedural due

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[6] Ordinance 529 exempts from review cost-of-living rent increases based on a formula derived from the California Consumer Price Index.

process challenge to such action. When the action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law.[7]

[9] Plaintiff's second and third theories, although involving different alleged property interests, both hinge upon a claim that the City Manager treated plaintiff's application wrongfully and arbitrarily, depriving it of a property right that had vested under state law. Such allegations can amount to a claim for denial of procedural due process. *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1405-06 (1989), *cert. denied*, 110 S. Ct. 1317 (1990). Whether such a claim is barred by *Parratt v. Taylor*, 451 U.S. 527 (1981), is unclear after *Zinermon*. *Parratt* held that plaintiff must first pursue state remedies when bringing a claim for violation of procedural due process based on random, unauthorized acts of state officials; *Zinermon* appears to allow federal claims in similar situations by focusing on the authority and function of the state official in question. Two of our sister circuits have taken conflicting views on the subject, in each case raising strong dissents. *See Caine v. Hardy*, 905 F.2d 858 (5th Cir. 1990); *id.* at 863 (Jones, J., dissenting); *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc), *petition for cert. filed*, 59 U.S.L.W. 3406 (U.S. Nov. 13, 1990) (No. 90-791); 910 F.2d at 1408 (Easterbrook, J., concurring); *id.* at 1410 (Cudahy, J., joined by Cummings and

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[7] We need not consider here whether a claim of major corruption of the legislative process – such as the acceptance of bribes by one or more of the legislators – would give rise to a procedural due process claim.

Posner, JJ., dissenting). We need not enter the fray at this time because plaintiff's claims about the City Manager's action can equally well be stated as substantive due process claims. Where, as here, the plaintiff alleges that the denial of due process consists of an official's arbitrary action, a claim for violation of substantive due process is indistinguishable from a claim for violation of procedural due process. Since the Supreme Court held in *Zinermon* that substantive due process claims are not subject to diversion to state court under *Parratt*, *see* 110 S. Ct. at 983, we need not consider whether the procedural due process claims, standing alone, would have to be so diverted.

B. Substantive Due Process

As noted, Sierra Lakes' procedural due process claims can also be stated as substantive due process claims. While a substantive due process claim may arise out of the same facts as a procedural due process claim, the claims are different in several important respects. Whereas a procedural due process claim challenges the procedures used in effecting a deprivation, a substantive due process claim challenges the governmental action itself. Because the harm of a substantive due process violation occurs at the time of the wrongful government action, plaintiff's section 1983 action arises when the wrongful action is taken. *Zinermon*, 110 S. Ct. at 983. *Parratt's* requirement that plaintiff avail itself of state tort remedies does not apply to substantive due process claims. *Id.*

[10] To establish a violation of substantive due process. Sierra Lakes "must prove that the government's

action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' " *Sinaloa Lake Owners*, 882 F.2d at 1407 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); *see also Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

[11] According to the allegations of the complaint, the City and its officials obstructed Sierra Lakes' rent increase applications at almost every turn, and then finally allowed an increase that was still less than what Sierra Lakes considers adequate. It is well within the realm of possibility that plaintiff could establish that City's actions in processing the applications were wrongful or arbitrary. Given that plaintiff could state a substantive due process claim, the district court erred in dismissing without leave to amend. *Hall*, 833 F.2d at 1274 n.6; *see also McCalden v. California Library Ass'n*. No. 88-5727, slip op. at 14245, 14262 (9th Cir. Nov. 20, 1990).[8]

[12] Sierra Lakes may also have a substantive due process claim to the extent it complains that Ordinance 529 deprived it of a "fair and reasonable" return on its investment by denying it rent increases on account of capital improvements made prior to its enactment and by limiting the amount it may recover on account of later-made improvements. *See Guaranty National Insurance Co.*

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[8] On remand, the district court will have to determine whether the initial rent increase application was valid. If the initial rent increase application was not valid, then there was no deprivation, and therefore Sierra Lakes would be entitled only to nominal damages. *See Zinermon*, 110 S. Ct. at 983.

v. Gates, No. 89-16288, slip op. at 13771, 13780-85 & n.4 (9th Cir. Nov. 8, 1990).

[13] Under *Guaranty National*, every dollar the landlord puts into the property by way of capital improvements constitutes an investment in the property for which a "fair and reasonable" return must be allowed. Breaking even is not enough; the law must provide for a profit on one's investment. Slip op. at 13786. Thus, Ordinance 529 must do more than simply allow plaintiff to pass through certain costs; it must ensure that plaintiff will receive a reasonable return on those expenditures.[9] To the extent plaintiff alleges that the rent increases allowed on account of capital improvements merely offset the cost of those improvements (or less), it has stated a claim for a violation of substantive due process under *Guaranty National*.[10]

[14] Sierra Lakes also alleges a substantive due process violation based on the enactment of the vacancy control provision of the ordinance, *see* pp. 8468-69 *supra*. To prevail on this claim, Sierra Lakes must show that no rational relationship exists between the vacancy control

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[9] Sections 2.46.200A & B of Ordinance 529 could be construed to permit only a passing through of costs without allowance for a reasonable profit. On remand, the district court should determine whether Ordinance 529 in fact allows a reasonable return on investment.

[10] The principle of "fair and reasonable return on investment" may support a takings claim as well as a substantive due process claim. *See Mountain Water Co. v. Montana Dep't of Public Serv. Regulation*, No. 88-4097, slip op. at 14535, 14550 (9th Cir. Nov. 26, 1990) (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989)).

provision and the purpose of the ordinance. *See Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988). Sierra Lakes cannot meet this heavy burden. Although it may be true that the ordinance in some cases takes money from the landlord and puts it into the pocket of a tenant who no longer resides at the park, the City council could reasonably believe that in the majority of cases the ordinance serves the valid public purpose of keeping mobile home rent from becoming prohibitively high. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988). How well the ordinance serves this purpose is a legislative question, one the court will not consider.

C. Equal Protection Claims

[15] Sierra Lakes also alleges that it was denied equal protection of the laws. Plaintiff can establish an equal protection claim by showing that the City of Rocklin or its officials applied the law in an arbitrary or invidiously discriminatory manner. Although equal protection challenges to state action that does not "trammel[ ] fundamental personal rights or implicate[ ] a suspect classification," *Lockary v. Kayfetz*, No. 87-15044, slip op. at 13449, 13459 (Oct. 30, 1990), receive only rational basis scrutiny, "the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary." *Id.; see also Del Monte Dunes*, No. 88-1593, slip op. at 15283-84 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 & n.4 (1987)). In this context, plaintiff's equal protection claim is identical to

its first substantive due process claim, and we reverse the district court for the same reason.[11]

Conclusion

The district court's judgment is reversed. We remand for further proceedings consistent with this opinion.

GOODWIN, Circuit Judge, Concurring.

Today we hold that the Rocklin rent control ordinance, as applied, results in a physical taking of private property. We reach this result because the law of the circuit is found in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

I concur under the compulsion of precedent, but for the record I want to note that I have not forgotten the difference between the physical and the metaphysical. *Hall* reached a commendable legislative result by calling a regulatory ordinance a physical taking. I am in somewhat the same position as I found myself upon first reading *Roe v. Wade*, 410 U.S. 113 (1973), applauding the result but

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[11] To the extent Sierra Lakes raises an equal protection challenge to the enactment of Ordinance 529, such a challenge could succeed only if the ordinance served "no legitimate governmental purpose and if impermissible animus toward an unpopular group prompted the statute's enactment." *Mountain Water Co.*, slip op. at 14546 (citing *USDA v. Moreno*, 413 U.S. 528 (1973)). Thus, if the district court on remand were to find that the enactment of Ordinance 529 reflected hostility toward landlords as a group, it would be obligated to analyze the statute for legitimacy, as opposed to mere rationality.

disturbed by the method. Nonetheless, *stare decisis* is a proven policy, and I concur.

United States Court of Appeals
For the Ninth Circuit

Sierra Lake Reserve, Plaintiff-Appellant, v. The City of Rocklin; The Rocklin Mobile Home Rent Review Commission: Carlos Urrutia; Rusty Selix; Rudolf Michaels; George Paras Defendants-Appellees.	No. 89-15371 D.C. No. CV-87-1347-LKK ORDER

Before: GOODWIN, KOZINSKI and NOONAN, Circuit Judges.

The petition for rehearing is denied. The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote thereon. Fed. R. App. P. 35(b).

On remand, the district court shall address in the first instance the statute of limitation issues raised by defendants in light of our recent decisions in *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), and *De Anza Properties v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991).

Dated: February 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SIERRA LAKES RESERVE, Plaintiff, v. THE CITY OF ROCKLIN, et al., Defendants.	NO. CIV.S-87-1347-LKK *ORDER*

Plaintiff's motion to dismiss, abstain, or for a more definite statement, came on for hearing on this court's regularly scheduled law and motion calendar. Anthony D. Rodriguez appeared as counsel on behalf of plaintiff; Michelle Marchetta Kenyon appeared on behalf of defendants. After hearing, the matter was taken under submission and is disposed of herein. As I now explain, defendants' motion to dismiss the action is GRANTED in full. Accordingly, I need not reach defendants' motions in the alternative to abstain or for a more definite statement.

I. CASE BACKGROUND

Plaintiff, a California general partnership that owns a mobile home park in the City of Rocklin, contests the facial validity and the administrative application of three successive rent control ordinances that the City of Rocklin has imposed upon local mobile home parks since 1979: Ordinance 410 (effective from November 11, 1979 through May 17, 1982), Ordinance 472 (effective from May 17,

1982 through April 1, 1985), and Ordinance 529 (effective April 1, 1985 to present, and the principal ordinance contested in this litigation). Defendants include the City of Rocklin, its Mobile Home Rent Review Commission, and several municipal officials with administrative responsibilities under Ordinance 529.

The respective rent control ordinances permit park owners to increase rents in relation to increases in the consumer price index as a matter of course, but subject most other increases to a mediation and arbitration process that affords administrators significant discretion to determine which rates are reasonable. The ordinances delineate broad standards of reasonableness to be applied in hearings on proposed rate increases based upon such factors as capital improvements, rehabilitation, and rates of return. In addition, they strictly control the amount of rent increase permitted to park owners upon a tenant's voluntary vacancy to the lesser amount of 10 percent or $20.

Plaintiff's complaint, filed on December 12, 1987, alleges that a wide variety of inconsistently applied administrative procedures have thwarted its requested increases in rates of return. These actions include enforcement of Ordinance 410 in a way that voided a prior contractual agreement to raise rent; a so-called "surprise statute of limitations" of one year in Ordinance 472 that contradicted prior assurances that plaintiffs would be able to refile under the ordinance; rejection of a particular rate increase for plaintiffs' alleged failure to supply information for which no line existed on the application form; wrongful acceptance of uncertified evidence from park residents; wrongful refusal to allow plaintiff to cross-

examine opposing witnesses or submit expert appraisers' testimony; wrongful denial of various rent increases, including nondiscretionary consumer price index increases; and wrongful acceptance of a request for rent reduction that led some tenants to withhold rent. *See* Complaint, 11-48. In addition, plaintiff alleges that because the ordinances do not control tenants' rights to sell their mobile homes or sublet their rented spaces at a premium, and because state law permits mobile home tenants to remain in these spaces indefinitely unless good cause is shown for eviction, *see* California Civil Code § 798.56, the ordinances have transferred a property interest to tenants that amounts to a physical taking of plaintiff's property. *See Generally Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 1120 (1988).

The complaint asserts six claims, based upon the enactment and/or application of these mobile home rent control ordinances, alleging that they denied to plaintiff a fair and reasonable rate of return. These claims may be characterized as follows:

1. Inverse condemnation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Acts;

2. Inverse condemnation in violation of Article I, section 19 of the California Constitution and state law;

3. Deprivation of due process in violation of the Federal Civil Rights Act, 42 U.S.C. § 1983;

4. privation of equal protection in violation of 42 U.S.C. § 1983;

5. Misrepresentation and fraud in the inducement, based upon concealment of facts that, if known to plaintiff at the time, would have resulted in plaintiff's refusal to enter into the contract or negotiate different terms;[1]

6. Declaratory relief against the City of Rocklin that Ordinance 529 is unconstitutionally vague and/or deprives plaintiff of a fair and reasonable rate of return without just compensation.

II. GENERAL STANDARDS

Defendants seek dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6). The standards governing 12(b)(6) motions are well-established and need not receive extensive discussion here. *See, e.g., Cruz v. Beto,* 405 U.S. 319, 322 (1972) (courts must accept allegations of complaint as true); *Retail Clerks International Association v. Schermerhorn,* 373 U.S. 746, 753 n.6 (1963) (plaintiff must be given the benefit of every inference to be drawn from the "well pleaded" allegations of the complaint). The Ninth Circuit has emphasized that "[w]hile dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that plaintiffs have not been denied a full and fair opportunity to present their claims." *Hall,* 833 F.2d at 1274.[2] Nonetheless, where state or local procedures not heretofore utilized would provide such a full and fair opportunity, certain types of inverse condemnation claims may be dismissed

as unripe for federal court adjudication. *See, e.g., Casserttari v. Nevada County*, 824 F.2d 735, 738 (9th Cir. 1987) (affirming dismissal of takings claim as unripe for adjudication, where California had an available and adequate inverse condemnation procedure). *Accord Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988).

III. RIPENESS OF TAKINGS CLAIM

A. Ripeness Standards

The text of the Fifth Amendment expressly provides in relevant part that "private property [shall not] be taken for public use without just compensation." The Supreme Court has "frequently noted" that "this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 107 S. Ct. 2378, 2385 (1987). The takings clause "is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' " *Id.* at 2386 (quoting *Armstrong v. United States*, 365 U.S. 40, 49 (1960)) (emphasis in original).

It is beyond dispute that a plaintiff asserting a takings claim must "seek compensation through the procedures the state has provided for doing so" before the claim is ripe for review. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985);

First English, 107 S. Ct. at 2384 n.6. The words "without just compensation" in the Fifth Amendment make this requirement something other than a mandate to exhaust administrative remedies; rather, the unavoidable conclusion from the text is that no constitutional violation exists until plaintiff has sought and has been denied just compensation. Since the constitution requires no pretaking compensation and is satisfied by an adequate procedure to obtain posttaking compensation, "the state's action . . . is not 'complete' until the state fails to provide adequate compensation for the taking." *Williamson County*, 473 U.S. 340 (1986). Consequently, "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the just compensation law until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195. Where plaintiff has not alleged that it has made use of available state procedures for obtaining just compensation, dismissal is appropriate. *Cassettari*, 824 F.2d at 737.

A two-step process appears appropriate in resolving defendants' motion to dismiss. First, I must determine whether, drawing all reasonable inferences from plaintiff's complaint in its favor, plaintiff may have stated a claim that the governmental action amounted to a taking of property. *See Hall*, 833 F.2d at 1274; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984). If plaintiff makes this threshold showing, I must then consider whether the state can be said at this stage to have denied plaintiff just compensation for the alleged taking. *See, e.g., Williamson County*, 473 U.S. at 186. In this latter regard, I must address defendants' contention that where the "taking" may be classified as a physical occupation of property

rather than a regulatory taking, the claim is by definition ripe. As I explain below, I find that plaintiff has sufficiently alleged a "taking" to withstand a motion to dismiss under Ninth Circuit law, however, I also find that because plaintiff has not made use of state procedures to obtain just compensation, plaintiff's takings claim must be dismissed as unripe.[3]

B. Existence of a Taking

The issue of whether the complaint sufficiently alleges the existence of a "taking" appears to turn, in the first instance, on whether the alleged taking may be classified as a "regulatory" taking, in which the "value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property," or a case of physical occupation, where "the government physically intrudes upon private property either directly or by authorizing others to do so." *Hall*, 833 F.2d at 1275. *Compare Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). (regulation drastically reducing value did not constitute taking) *and Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical occupation constituted a taking despite minimal burden on property owner). Regulatory taking cases are "by their nature not ripe for adjudication until the government has had its final say, thereby defining precisely what (if anything) was taken." *Hall*, 833 F.2d at 1281 n.28. By contrast, "[w]here there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact." *Id.* at 1282 n.28.

The Supreme Court has never found an ordinary rent control statute to constitute a taking of property. *See, e.g., Fisher v. City of Berkeley,* 471 U.S. 1124 (1985) (dismissing appeal of ruling that rent control statute need not provide landlord a reasonable return on investment for want of a substantial federal question); *Fresh Pond Shopping Center, Inc. v. Callahan,* 464 U.S. 875 (1983) (dismissing appeal of ruling upholding rent control statute limiting right to remove tenant for personal use for want of a substantial federal question). *Compare Pennell v. City of San Jose,* 485 U.S. at 875 (Rehnquist, dissenting). Nonetheless, under the circumstances of this case, I am bound to follow the Ninth Circuit's decision in *Hall* that a mobile home rent control ordinance that possesses certain peculiar features may support an allegation that a *physical* taking of property occurred, and thus a complaint alleging an ordinance with such features suffices to withstand dismissal on this threshold issue. *See, generally,* 833 F.2d at 1270, *et seq.*

In *Hall,* the Ninth Circuit found that several features of the mobile home rent control ordinance under challenge made it particularly susceptible to allegations that it might constitute a physical taking of property. "Reduced to its essentials," the claim was that "the . . . ordinance has transferred a posssessory interest in [owner's] land to each of [the] tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that interest is transferable, has an established market and market value." *Id.* at 1276. The court argued that "[t]he right to occupy the property in perpetuity is surely the type of interest that is protected by the takings clause." *Id.*

Unfortunately, the Ninth Circuit's holding in *Hall* hardly stands as a model of clarity. First, it is unclear which passages of the text comprise the ration decidendi of the opinion and which are dicta. *Hall* reads:

> Although the Halls' complaint was somewhat elliptical, the opposition to the motion to dismiss fairly advised defendant and the district court as to the nature of plaintiffs' claim. Under such circumstances, leave to amend the complaint, rather than dismissal, is the appropriate course of action. . . . We believe the district court abused its discretion by dismissing rather than giving plaintiffs an opportunity to amend the complaint.

833 F.2d at 1274 n.6. While this passage is susceptible to a reading that would reduce the rest of the opinion to dicta, it does not seem reasonable to believe that the court placed the holding in a footnote and then proceeded to pages of dicta. Even if it were to be held that the court behaved in such a bizarre fashion, at the very least, the balance of the opinion strongly suggests how the circuit would construe the "takings" implications of a clearly worded complaint raising similar allegations.

Second, I recognize the possibility, noted in a vigorous dissent to the denial of an en banc hearing in *Hall*, that the court's opinion adopts the analysis of the dissenting opinion in *Fresh Pond*, thus characterizing as a potential physical occupation a rent control ordinance that "is in all material respects identical to three rent regulation challenges that the Supreme Court dismissed in recent years as lacking a substantial federal question." *Hall*, 833 F.2d at 1282 (Schroeder, et al., dissenting from denial of

en banc hearing). *See Fisher v. City of Berkeley*, 471 U.S. 1124 (1985); *Nash v. City of Santa Monica*, 470 U.S. 1046 (1985); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983). Unlike *Loretto*, 458 U.S. 419, and its progeny, in which a physical occupation of property literally occurred, the circuit majority has arguably used the metaphorical construct of property as a bundle of rights to collapse the distinction between cases involving regulations that drastically reduce value and cases involving literal physical occupation. *See* 833 F.2d at 1279-80.[4] Whatever the merits of this argument, however, I am bound to follow Ninth Circuit constructions of Supreme Court precedent. *See Tello v. McMahon*, 677 F. Supp. 1436 (E.D. Cal. 1988).[5]

The *Hall* court found that several "features" of the rent control ordinance under challenge made it "peculiarly susceptible" to plaintiff's claims. First, we are told that "the ordinance directs the landlord to give tenants a lease, a recognized estate in land, lasting indefinitely;" the fact that this right was alterable by mutual consent was unavailing, since "presumably tenants forego a statutory lease only if the landlord gives them something better." *Hall*, 833 F.2d at 1226 and n.6. Second, the "landlord's residual rights in his property are largely at the mercy of his tenants; he loses practically all right to decide who occupies the property, and on what terms;" this facet left the landlord with "no meaningful say as to who will live on the property, now or in the future." Third, "because of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he sells his mobile home." *Id.* at 1276.

The *Hall* court rejected several arguments that defendants advanced to distinguish the claims alleged from those in physical occupation cases. First, the fact that the ordinance might someday be repealed did not defeat a takings claim. Second, the fact that the tenants could be removed for cause did "not change the fact that tenants are given an indefeasible right to possession so long as they pay controlled rent and behave themselves." *Id.* at 1277. Third, the fact that the physical occupation was not literally by the government was held not to matter, because the tenant's occupation was authorized by the state. Fourth, the fact that a landlord could go out of business was immaterial. Fifth, the possibility that rents may have adequately compensated plaintiffs was irrelevant to the threshold determination of whether the taking occurred. Finally, the court distinguished the ordinance being considered from garden variety rent control measures by saying that under the governing provisions, "the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms." *Id.* at 1278.[6]

When the facts alleged in the complaint are read against the requirements of state law relative to tenants in mobile home parks, the ordinances at bar possess characteristics quite similar to those found to potentially constitute a taking in *Hall*.[7] Taken as true, the allegations suggest that they allow tenants to remain in their existing units indefinitely unless evicted for cause; second, provided that if the tenant chooses to stay, the landlord, who is alleged not to control tenants' subleasing of the space or selling of the mobile home, would lose practically all the right to decide who would occupy his property and

on what terms; third, the ordinance is alleged to allow tenants to capture a rent control premium by selling the mobile home. Defendants' contention that the ordinance does not create a permanent possessory interest ignores the operation of state mobile home laws on the matter at bar. The Santa Barbara ordinance in *Hall* required the landlord to allow tenants to live in rent-controlled mobile home parks so long as they did not give any cause for eviction. *Hall*, 833 F.2d at 1273 n.2. Similarly, tenants in the Sierra Lakes mobile home park receive the statutory protection of California Civil Code section 798.56, which permits any mobile home tenant to remain indefinitely unless evicted for the *same* for-cause reasons set out in *Hall*, 833 F.2d at 1273 n.2. *See id.* at 1277 ("[t]he ability to remove tenants for cause . . . does not change the fact that tenants are given an indefeasible right to possession so long as they pay the controlled rent and behave themselves"). Since in operation, the ordinances described in plaintiff's complaint suggests that the relationship between landlord and tenant may be structured the same way as in *Hall*, my obliged fidelity to Ninth Circuit precedent requires me to find the allegations sufficient to potentially state a claim for a physical occupation of property.[8] I must now consider whether plaintiff failed to use state procedures to seek just compensation.

C. Failure to Seek Just Compensation Through State Procedures.

I must initially address plaintiff's contention that because its taking claims are in the nature of a physical occupation of property, they are already ripe and need

not be examined in light of further state procedures. Relying on a footnote in *Hall*, plaintiff contends that physical occupation cases are exempt from the procedural requirements of regulatory taking cases. Distinguishing *Williamson County* and *MacDonald*, the *Hall* court noted that "[b]y their nature, regulatory taking cases are not ripe for constitutional adjudication until the government authority has had its final say, defining precisely what (if anything) was taken. . . . Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change the fact." *Hall*, 833 F.2d at 1281-82 n.28.

Plaintiff's argument muddles a critical distinction between two different senses in which courts discuss recourse to available state procedures. Both senses are discussed in *Williamson County*. The first sense is indeed specific to regulatory takings; it indicates that a regulatory taking "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property in issue." *Williamson County*, 473 U.S. at 186. This is the sense in which the *Hall* court found *Williamson County* inapposite. "Unlike [*Williamson County* and *MacDonald*]," plaintiffs had "no further administrative recourse available; there is nothing they may do under the . . . ordinance that would exempt them from its reach or cut off the rights they claim tenants now have in their land." *Hall*, 833 F.2d at 1281 n.28. Where further administrative recourse is available in a case claiming regulatory taking, it would be premature to assert that a taking has in fact occurred. Plaintiff is correct that it need not meet this type of argument to perfect its claim.

However, *Williamson County* also notes a "second" reason the claim was not ripe; namely, that plaintiff "did not seek compensation through the procedures the state has provided for doing so. The Fifth Amendment does not prescribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. This second sense of "state proceedings" is not discussed in the *Hall* footnote. To assert, as plaintiff does, that *Hall* abandons the requirement by implication, would be to ignore the express language of the Fifth Amendment. Simply stated, a constitutional violation under the takings clause is not complete until plaintiff has sought and has been denied just compensation. If the state has provided an "adequate procedure" for obtaining just compensation and resort to the procedure yields the compensation, there is no claim against the government for a taking. *Williamson County*, 473 U.S. at 195; *Cassettari*, 924 F.2d at 737-38. Thus, where state law permits a property owner to bring an inverse condemnation action to obtain just compensation for an alleged taking, and plaintiff is not alleged to have pursued such a claim, any claim of a constitutional violation is necessarily unripe. *See Cassettari*, 824 F.2d at 738 (California law); *Williamson County*, 473 U.S. at 196.[9]

Finally, I find that plaintiffs have an adequate procedure under state inverse condemnation law to obtain just compensation. Defendants' success in demonstrating that a claim exists for physical occupation of property suggests, contrary to defendants' intentions, that a damage remedy in inverse condemnation exists for such an occupation under longstanding principles of California law. "Clearly in cases of physical invasion an inverse condemnation action is appropriate." *Baker v. Burbank-*

Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 867 (1985), *cert. denied*, 475 U.S. 1017 (1986); *see also Marina Plaza v. California Coastal Conservation Comm.*, 73 Cal.App.3d 311, 325 (1977).[10]

Given that plaintiff claims a physical taking, I need not reach the more troubling question of whether failure to pursue state inverse condemnation procedures would render the claims unripe if they merely stated a potential regulatory taking.[11]

Since I find that plaintiff has failed to allege that it sought just compensation, and that an adequate procedure existed for obtaining any such compensation in a state inverse condemnation action, plaintiff's first and second claims must be dismissed.

IV. DUE PROCESS CLAIM UNDER 42 U.S.C. § 1983

A. Claims Outside the Scope of Established State Procedure

I turn initially to defendants' contention, advanced at hearing, the plaintiff's failure to first seek compensation through state procedures defeats plaintiff's civil rights claim for due process violations for reasons advanced in *Parratt v. Taylor*, 451 U.S. 527 (1981), as applied to land use restrictions in *Lake Nacimento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 879 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 79 (1988). In *Lake Nacimento*, the Ninth Circuit found deficient a developer's procedural due process challenge to county zoning restrictions whose process was allegedly tainted by a voting supervisor's conflict of interest. The court declined to confine *Parratt*

to "prisoner" cases, and noted that damages could be sought in a state court proceeding. *Id.* at 878-79.

The *Parratt* line of cases does not extend to those governed by *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), "in which the deprivation of property is effected pursuant to an established state policy or procedure, and the state could provide predeprivation process." *Williamson County*, 473 U.S. at 195 n.15. *Logan* distinguished *Parratt* on the ground that its alleged tortious loss of property was purported to be "a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." *Logan*, 455 U.S. at 435-36 (quoting *Parratt*, 451 U.S. at 541). Where the allegation is that "the state system itself . . . destroys a complainant's property interest, by operation of law," *Logan* rather than *Parratt* applied. *Id.* at 436.

The due process claim in the case at bar appears to include a hybrid of allegations falling under *Parratt* and allegations falling under *Logan*. On the one hand, plaintiff alleges that in the implementation of the rent control ordinances, defendants "acted out of the scope of their capacity" and "arbitrarily and contrary to law" in "denying Sierra Lakes the pass through of capital improvements and increased costs of operation and maintenance, a fair and reasonable rate of return and an adjustment of its rate of return for inflation." Plaintiff's Complaint, 57.[12] Included in the complaint's factual summary are assertions that individual administrators acted in contravention of the terms of the rent control ordinances on their own promises. *See, e.g.*, 23, 28, 32, 35, 36, 39. These types of claims are properly under the domain of *Parratt*, and for reasons similar to those in *Lake Nacimento*, plaintiff's

failure to first seek compensation through state procedures would foreclose a claim under section 1983.[13]

Parratt "applied whenever a *procedure* for redress of a deprivation of a procedural due process right is available." *Lake Nacimento*, 841 F.2d at 879; *see also Parratt*, 451 U.S. at 543; *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986). In the case at bar, plaintiff has filed a petition for writ of mandate in state court seeking adjudication of the same due process issues that are raised in the third claim of its complaint. *Sierra Lakes Reserve v. City of Rocklin*, Placer County Supervisor Court No. 78202. The reviewing court in an administrative mandamus action shall consider whether there was a fair trial and whether there was a prejudicial abuse of discretion. The latter may be established "if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Cal. Code Civ. Pro. § 1094.5(b). Evidence that was improperly excluded at the hearing stage may either be a basis for remand to the agency or may be admitted at the review stage without remand. *Id.* at § 1094.5(e). Where, after review, the court finds that the administrative decision must be set aside, "it may order reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law." *Id.* at § 1094.5(f). Where appropriate, damages and costs may also be recovered from the public entity.[14] Even if additional remedies would be available under a section 1983 claim than under the state procedure, this would be "irrelevant under the circumstances." *Lake Nacimento*, 841 F.2d at 879; *see also Parratt*, 451 U.S. at 583. In sum, if the

complaint alleged only a *Parratt*-like deprivation of due process, it might well not lie under section 1983 by virtue of *Lake Nacimento*.

The complaint, however, also contains allegations that the established state procedures embodied in the rent control ordinances and underlying state law have, by operation of law, destroyed plaintiff's asserted property interest. Complaint, 15, 47, 73. Each defendant is alleged to have "acted under color of state law and in both their official and individual capacities to effect the taking of Sierra Lakes' property interest in derogation of Sierra Lakes' rights to due process of law. . . . " *Id.* at 63. To the extent that the asserted due process violations directly challenge these established state procedures, they would be governed by *Logan*. *Parratt* would not apply to these claims, and plaintiff's failure to first seek compensation through state procedures would not require dismissal.

B. Claims Within the Scope of Established State Procedure

To the extent that plaintiff's section 1983 claims challenge established state procedures on due process grounds, they cannot be dismissed on the grounds noted in *Parratt* and *Lake Nacimento*; nor can they be dismissed on "ripeness" grounds in the manner of the takings claims discussed above.[15] To withstand dismissal, however, plaintiff must state a prima facie case meeting the threshold requirements of a procedural due process claim. These requirements do not turn on the result obtained in any individual case, but rather, by the risk of

error inherent in the truth-finding process as applied to the generality of cases. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985). According to well-established principles, procedural due process requires a two-step analysis: first, to determine whether liberty or property interests exist entitling the entity to procedural due process protections; and second, if such a constitutionally protected interest is established, to determine what process is due. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Hewitt v. Grabicki*, 794 F.2d 1373 (9th Cir. 1986).

I turn first to the question of whether a constitutionally protected property or liberty interest is present. Since the case at bar concerns a corporation's allegations of economic loss, it is clear that no claim exists for deprivation of a liberty interest. Consequently, I must ascertain whether the complaint alleges the deprivation of a protected property interest.

Property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. at 577; *see also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). A "property interest in a benefit protected by the due process clause results from a legitimate claim of entitlement created and defined by an independent source, such as state or federal law." *Jacobson v. Hannifin*, 627 F.2d 177, 179 (9th Cir. 1980); *Russell v. Landrieu*, 621 F.2d 1037, 1040 (9th Cir.

1980). In contrast, a unilateral expectation of a benefit under a ordinance does not create a protected property interest. *Board of Regents*, 408 U.S. at 577. The existence of a reasonable expectation of entitlement "is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms." *Association of Orange County Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir. 1983), *cert. denied sub nom., Singer v. Gates*, 466 U.S. 937 (1984); *see also Jacobson*, 627 F.2d at 180.

Because under *Roth* whatever property interest plaintiff claims is protected by his Fourteenth Amendment Claim is defined by state law (plaintiff suggests no other "independent" source), I turn to the state law relative to rent control ordinances. Under California law, a rent control agency is "not obliged by either the state or federal Constitution to fix rents by application of any particular method or formula." *Fisher v. City of Berkeley*, 37 Cal.3d 644, 680 (1984), *aff'd* 475 U.S. 260 (1986); *Carson Mobilehome Park Owners Ass'n v. City of Carson*, 35 Cal.3d 184, 191 (1983), *cf. CTS Corporation v. Dynamics Corporation of America*, 481 U.S. 69, 95 L. Ed. 2d 67, 87 (1987) ("the Constitution does not require the states to subscribe to any particular economic theory"). Moreover, under California law, it is a "well settled principle that a municipality is empowered to regulate rents with respect to local conditions in order to eliminate excessive rents so long as a landlord receives a just and reasonable return on the property." *Berman v. City of West Hollywood Rent Stabilization Dept.*, 197 Cal.App.3d 837, 841 (1988); *see also Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 163-65 (1976).

Plaintiff's claims of a protected property interest are predicated on three different sources of authority. First,

plaintiff contends that the text of the currently applicable mobile home rent control ordinance – Ordinance 529 – itself creates such interests. For reasons discussed above, to the extent that administrators acted in contravention of their authority under the ordinance, plaintiff's claims are barred under the *Parratt* doctrine. It is also noteworthy, however, that the ordinance is not mechanically designed to grant landlords rent increases according to an automatic formula. Rather, mediators and arbitrators are given the discretion to determine "whether rent increases are reasonable under the circumstances, taking into consideration that the purpose of this chapter is to permit owners a fair and reasonable return while protecting tenants from arbitrary, capricious, or unreasonable rent increases in light of the mobile home market conditions . . . . " Defendants' Points and Authorities, Exhibit B (Ordinance 529), 2.46.200A, p.20-5b.[16]

Plaintiff also contends that the language in the ordinance may not be read to compromise property interests protected by the state constitution. It is true that "if a rent control commission renders a decision denying a just and reasonable return on property, the decision involves an unconstitutional deprivation of a property right." *San Marcos Mobilehome Park Owners' Assn. v. City of San Marcos*, 192 Cal.App.3d 1492, 1501 (1987). However, a rent control ordinance's provisions "are within the proper exercise of a government's police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property." *Id.* at 1500. To comply with

California constitutional standards, a rent control ordinance must be "reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property." *Birkenfeld*, 17 Cal.3d at 165; *see also Baskin v. City of Berkeley Rent Stabilization Board*, No. A037728 (Cal. Ct. App., 1st Dist., December 15, 1988). "Rent which meets the minimum standards of being fair and reasonable is that amount which will permit the property to generate income sufficient to cover the costs of operation and the servicing of reasonable financing and to ensure the return of a reasonable profit." *Cotati Alliance for Better Housing v. City of Cotati*, 148 Cal.App.3d 280, 294 (1983); *Baskin*, *supra*. There is a range of rents which can be charged, all of which could be characterized as a "just and reasonable return." *San Marcos*, 192 Cal.App.3d at 1502. Rather than constituting a deviation from the constitutional standards, the language of the Ordinance quoted above parallels the broad standards that state courts have repeatedly followed. Accordingly, plaintiff's allegations provide no basis for a finding that the ordinance itself compromises property interests protected by the state constitution.[17]

Finally, plaintiff contends that it acquired "vested" property rights by virtue of its reliance on administrators' representations that it could apply later to recover for certain capital improvements. For purposes of this due process analysis, the central problem with this claim is that these rights are predicated upon administrators' assurances that were each, if proven, not within the scope of the administrator's authority. Accordingly, for reasons discussed in the preceding section, the claims must fail under *Parratt*. *See* Plaintiff's Points and Authorities at 9.

("[W]hen the plaintiff tried to exercise its rights, the City, through procedural maneuvering akin to fraud, deprived plaintiff of those rights"). To the extent that the due process challenge goes to the actual ordinance rather than improper application of the ordinance as noted above, the terms of the ordinance appear to provide the type of protection that the California Constitution requires of rent control ordinances. Vested rights are "grounded on equitable principles of estoppel . . . where the conduct of the government amounts to a representation that such construction is fully approved and legal, and in reliance on such representation the owner materially changes position." *Stanson v. San Diego Regional Coastal Commission*, 101 Cal.App.3d 38, 49 (1980). However, a vested right "requires more than a good faith subjective belief that one has it . . . . When a legislative body gives a private party a limited right, the party is not exempt from the limitation merely because it is phrased ambiguously." *Russ Bldg. Partnership v. City and County of San Francisco*, 44 Cal.3d 839, 853 (1988). It is, to say the least, unlikely that state could consider landlords affected by a mobile home rent control ordinance to acquire vested rights in assurances about the terms of a future ordinance made by administrators. In contrast to a landowner in a case such as *Stanson*, the California courts have held that "a rent control decision does not interfere with the use of the land. It only restricts the escalation of rents, a deprivation not nearly as severe as one which precludes an already established use of land." *San Marcos*, 192 Cal.App.3d at 1503. In sum, I find that plaintiff has failed to raise a sufficient allegation of a protected property interest to withstand a motion to dismiss.[18]

Even if plaintiff could make such a showing, it has not made any showing that more process is due than that which the state already provides. Due process is a "flexible" concept whose analysis requires a review of the pertinent circumstances, *i.e.*, "a determination of the precise nature of the government function involved as well as of the private interest that has been [or will be] affected by governmental action." *Sierra Club v. Watt*, 608 F.Supp. 305 (E.D. Cal. 1985) (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)). Here, the "government function" is the process under which requests for rent increases or capital adjustments are approved or denied under the terms of the ordinance. The "private interest" ostensibly threatened with deprivation, *i.e.*, the right to a just and reasonable rate of return and pass through of costs, cannot be understood independently of the process under which it is determined which rent increases or capital adjustments are just and reasonable.

The "essential requirements" of due process are "Notice and an opportunity to respond." *Loudermill*, 470 U.S. at 546. The opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Sierra Club*, 608 F.Supp. at 326 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The Rocklin Rent Control Ordinance provided plaintiff with the opportunity to bring a petition for rent review, section 246.120, and arbitration, section 246.120. While plaintiff claims that these initial processes were procedurally defective, plaintiff also had the opportunity, once notified of the final denial of its requests, to be heard in the administrative mandamus

proceedings described in section III, *supra*. These proceedings provided plaintiff with a full opportunity to request that the adverse decisions be overturned and that damages be awarded. "It is sufficient, where only property rights are concerned, that there are at some stage an opportunity for a hearing and a judicial determination." *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950). *Accord Loudermill*, 470 U.S. at 542 n.7. Plaintiff does not contest the procedural adequacy of the administrative mandamus action. Accordingly, I find that even if there were a possibility of deprivation of a protected property interest, the state has provided all the process that is due.[19]

V. EQUAL PROTECTION CLAIM UNDER 42 U.S.C. § 1983

Plaintiff has not made a sufficient allegation of an equal protection violation to withstand dismissal. As a general matter, an equal protection claim will not lie unless plaintiff was treated differently than similarly situated persons. *Norco Construction, Inc., v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). Even assuming the truth of the material allegations in the complaint, the fact that a rent control ordinance treats certain broad economic groups differently would neither trigger heightened scrutiny nor undermine the existence of a rational basis for the economic classification. *See, e.g., Leavenworth Properties v. City and County of San Francisco*, 189 Cal.App.3d 986 (1987). Rather than providing any separate grounds, the equal protection claim simply repeats the allegations already discussed in the contest of due process. To the

extent that the ordinance itself appears to comport with state standards requiring "just and reasonable" returns to a landlord, as discussed in section IV(B), *supra*, the fact that it treats landlords and tenants differently would not constitute evidence of an equal protection violation. *Cf. DiMassimo v. City of Clearwater*, 805 F.2d 1136 (11th Cir. 1986). Accordingly, plaintiff's equal protection claim must be dismissed.[20]

VI. OTHER CLAIM

Plaintiff's sixth claim seeks declaratory relief requesting that the court declare Ordinance 529 unconstitutional because "it is vague and ambiguous and/or deprives Sierra Lakes of a fair and reasonable rate of return without just compensation." Complaint, 72.

To the extent that the claim asserts that the ordinance deprives plaintiff of a reasonable rate of return without just compensation, it must be dismissed for the same reason that the takings claim was dismissed in Section III, *supra*. The Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq., "neither extends the jurisdiction of the federal courts nor enlarges substantive rights. Therefore, subject matter jurisdiction cannot be predicated upon the Act and some other bases must be alleged." 5 Wright & Miller, *Federal Practice and Procedure* § 1238.

The only independent basis for declaratory relief alleged in this claim is that the ordinance is unconstitutionally vague and thus a violation of the Due Process Clause. While many laws are vague in the colloquial sense, they are only vague in the constitutional sense if they impose standards of conduct so indeterminate that it

would be impossible to determine just what conduct would result in sanctions. *Hastings v. Judicial Conference of U.S.*, 829 F.2d 91 (D.C. Cir. 1987), *cert. denied*, 459 U.S. 1203 (1983); *accord Chalmers v. City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985) (sufficient clarity so that ordinary people can understand what conduct is being prohibited and so that the regulation does not encourage arbitrary and discriminatory enforcement). While plaintiff continued to assert a vagueness argument in its opposition to this motion, it has for practical purposes abandoned the argument by conceding that "the Ordinance is not at all uncertain." Plaintiff's Points and Authorities at 14. In light of this concession, the remainder of Plaintiff's sixth claim must also be dismissed.

Since I have dismissed all plaintiff's federal claims, I can no longer exercise pendent jurisdiction over plaintiff's second claim (inverse condemnation) or plaintiff's fifth claim (misrepresentation and fraud in the inducement). Accordingly, these claims must now be dismissed for lack of federal jurisdiction.[21]

VII. CONCLUSION

Having found that dismissal is appropriate on each of plaintiff's claims, I find that defendants' motion to dismiss the action must be GRANTED. Because it is clear that the basis of dismissal is legal rather than a deficiency in the pleading of relevant facts, the dismissal will be without leave to amend so that if plaintiff chooses to do so, it may obtain prompt review of this decision.

IT IS SO ORDERED.

DATED: February 10, 1989.

LAWRENCE K. KARLTON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

END NOTES

1. This claim is predicated upon the allegation that, during negotiations on the refiling of plaintiff's rent increase application of October 16, 1984, and thereafter, defendants failed to disclose information they knew or should have known, (*i.e.*, that the new rent control ordinance would limit the pass-through of capital improvements to those "completed" in the 12-month period prior to any rent increase application and that one of the defendants represented that plaintiff would be allowed to recover the improvements under Ordinance 529.

2. I have noted a similar "rhetorical reluctance" to grant summary judgment expressed about antitrust cases. *See Grayson Elec. Co. v. Sacramento Municipal Utility Dist.*, 572 F. Supp. 1504, 1507 (E.D. Cal. 1984). I would respectfully suggest that the circuit cease attempting to vary the applicable standard, apparently based upon nothing more than an asserted assessment of complexity and an underlying sympathy with the particular cause of action. As I have previously observed, variable standards are inappropriate since a single federal rule governs motions to dismiss. *See Bhan v. NME Hospitals, Inc.*, 699 F.Supp. 988, 1006 n.3 (E.D. Cal. 1987)

3. Because I conclude that these claims are not ripe, I need not reach the further question tendered by the takings clause of whether the governmental action

advanced a legitimate governmental interest. *See, e.g., Agins v. City of Tiburon*, 477 U.S. 255, 260 (1980).

4. *Hall* may be contrasted with *Eamiello v. Liberty Mobile Home Sales, Inc.*, 208 Conn. 620 (1988) (holding that the modification of lessor's common law right to absolute control over lease term and identity of lessee effectuated by mobile home rent control ordinance was not sufficiently analogous to physical occupation to constitute a taking).

5. The Supreme Court has denied certiorari in *Hall*, 108 S. Ct. 1120 (9188).

6. The suppressed predicate of *Hall* is that the property interest protected by the takings clause are defined by the common law (presumably as it existed at the time of the adoption of the Fifth Amendment; or perhaps the Fourteenth). Given the understanding for due process purposes that property interests are ordinarily defined by state law, *see* §IV, *supra*, the soundness of the *Hall* predicate is certainly up for analysis.

7. It is important to recognize that a potentially critical distinction between this case and *Hall* is the source of the alleged deprivation of property rights. In *Hall*, the restrictions found potentially unconstitutionally onerous apparently derived from the ordinance itself. Here, on the other hand, at least some of the some significant restrictions derive from state statute. Surely, the takings clause cannot be read to deprive the state of "its right to modify the received common law through the legislative process." *See Crandall v. Wood*, 8 Cal. 136, 143 (1857); *see also State of California v. Superior Court (Lyon)*, 29 Cal.3d 210 (1981), *cert. denied sub. nom., Lyon v. California*, 454 U.S. 865 (1981).

8. This preliminary finding is emphatically different from a decision on the merits that a physical occupation has in fact occurred. I "do not express any view as to whether the ordinance constitutes a taking." *Hall*, 833 F.2d at 1282.

9. As the Ninth Circuit recently held, footnote 28 of *Hall* "only relieves plaintiff of the obligation to exhaust administrative remedies in physical taking cases – it does not excuse them from seeking just compensation through state procedures. Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Association v. City of Simi Valley*, No. 86-6425, slip op. at 69-70 (9th Cir. 1989).

10. Dicta in *Sinaloa Lake* may be construed to support a further distinction between ordinary physical invasion cases, which are affected by direct governmental action, and those in which the physical invasion is effected by a city ordinance. *Sinaloa Lake*, slip op. at 70. However, *Sinaloa Lake* simply cited the pre-*First English* California law indicating that no inverse condemnation action based upon a *regulatory* taking could be brought. *Id.*, *cf. Hall*, 833 F.2d at 1275 ("Supreme Court cases . . . can be divided into two lines of authority: the so-called regulatory taking cases and the physical occupation cases:). To the extent that plaintiff's complaint states a claim for physical occupation, it is outside the category in which inverse condemnation actions were barred at the time of the taking.

11. Until *First English*, California law held that a landowner could not obtain damages in an inverse condemnation action based upon a "regulatory" taking. *Agins v. Tiburon*, 24 Cal.3d 266 (1979), *aff'd on other grounds*, 477 U.S. 255 (1980). *But see McMillian v.*

Goleta Water District, 792 F.2d 1453, 1459 (9th Cir. 1986). Abrogating the California Supreme Court's *Agins* rule, *First English* noted that its denial of damages in instances of "temporary" regulatory takings "decided the compensation question inconsistently with the requirements of the Fifth Amendment." 107 S. Ct. at 2283. Accordingly, the *Agins* rule can no longer stand as a valid principle of California law. *See Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988). nonetheless, *Williamson County* indicates that the takings clause requires that the state provision for obtaining compensation exist "at the time of the taking." 473 U.S. at 194. Since the change in California law apparently "occurred after the alleged time of the taking in the case," it is likely that a claim merely alleging a potential regulatory taking would have been ripe notwithstanding *First English*. *See Zilber*, 692 F.2d at 1202. *Accord Sinaloa Lake*, slip op. at 70.

12. In light of these allegations, plaintiff's due process claim is distinguishable from *Sinaloa Lake*, where plaintiffs did not allege that the injury to their dam was the result of the random and unauthorized act of a state employee. *Sinaloa Lake*, slip op. at 76.

13. For these claims, any attempt to reclassify them as violations of "substantive" due process would be unavailing. It is true that *Parratt* is not applicable when plaintiff challenges the deprivation itself rather than procedural impropriety. *See, e.g., Mann v. City of Tucson*, 782 F.2d 790, 792-93 (9th Cir. 1986). However, the gravamen of the claims noted here is that administrators tainted the administrative process in rent control hearings by failing to follow the established state procedures by which they should have been bound. Such claims are properly under

the domain of *Parratt* and may not escape its authority by their redesignation in subsequent pleadings as substantive due process claims. *See Lake Nacimento*, 841 F.2d at 879; *Mann*, 782 F.2d at 792-93.

14. *See* Cal. Code Civ. Pro. § 1095 ("If judgment be given for the applicant, the applicant may recover the damages which the applicant has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and a peremptory mandate must also be awarded without delay. Damages and costs may be awarded in the manner provided for money judgments generally. In all cases where the respondent is an officer a public entity, all damages and costs, or either, which may be recovered or awarded, shall be recorded against the public entity represented by the officer . . . ")

15. Procedural due process is analytically distinct from the takings clause for purposes of determining ripeness. In the latter, unlike the former, no constitutional violation has occurred until the state has denied plaintiff "just compensation."

16. Increases are to be deemed reasonable where they consist only of passing through costs of capital improvements, maintenance and operation costs, and rehabilitation costs, where the costs bear a reasonable relationship to the purposes for which the costs were incurred and the value of the portion of the mobile home park to which they are applied. Costs of capital improvement and rehabilitation costs relate only to work completed in the 12 months preceding the date notice of the rent increase. *Id.* at 20-5b. Further increases may be granted based upon various financial or market information provided that the mediator or arbitrator finds the increases

reasonable under the circumstances. Ordinance 529, 2.46.200B, *id* at 20-5b-20-5c.

17. While the Ninth Circuit's decision in *Hall* and the Supreme Court's decision in *First English* have arguably expanded the protection of property interests under the Fifth Amendment takings clause, these decisions do not alter the scope of "property" for purposes of due process analysis. Because property interests "are not created by the [federal] Constitution." *Roth*, the underlying state law defines the scope of the protected property interest.

18. While plaintiff has alleged that it made substantial expenditures on capital improvements based upon assurances that it could reapply for increases under a future ordinance, these claims would be unlikely to suffice even if they fall outside the reach of *Parratt*. Since plaintiff has not alleged that any such increases had received full approval, their good faith belief that a future ordinance would provide such compensation would be suspect for reasons noted in *Russ Bldg*.

19. Plaintiff's failure to show that the government has not provided the process that is due is analytically distinct from the notion that administrative *remedies* must be exhausted before bringing an action. The latter argument would have no place in an action brought under 42 U.S.C. § 1983. *See Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). Rather, because the state has provided all the process that is due, there is no due process violation and the court need not reach the issue of remedies.

20. Plaintiff's points and authorities raise the additional allegation that the City of Rocklin intentionally discriminated against plaintiff because city administrators rejected its rent increase for failure to certify evidence, while allegedly accepting uncertified and

untimely evidence from residents. However, the assertion that these administrators inconsistently applied the provision in Ordinance 529 pertaining to certification will not suffice to sustain a claim of intentional discrimination. "A construction of the equal protection clause which would find a violation of federal right by every departure by state officers from state law is not favored." *Snowden v. Hughes*, 321 U.S. 1, 11-12 (1944). Indeed, "[t]he requirement of intentional discrimination prevents plaintiffs from bootstrapping all misapplications of state law into equal protection claims." *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1226 (1988).

21. Given the court's resolution above, I need not reach the issue of the application of the statute of limitations to the plaintiff's various claims.

Chapter 2.46

MOBILE HOME RENT MEDIATION ARBITRATION

Sections:

2.46.010 Definitions.

2.46.020 Applicability.

2.46.030 Rent review commission.

2.46.040 Duties and powers of the commission.

2.46.050 Increases subject to review – Exceptions.

2.46.060 Limitations on rent increases.

2.46.070 Petitions for rent review – Owners.

2.46.080 Petitions for rent review – Tenants.

2.46.090 Petition – Form.

2.46.100 Petition – Time of filing.

2.46.110 Petition – Effect of timely filing.

2.46.120 Mediation.

2.46.130 Mediation – Decision – Finality.

2.46.140 Request for arbitration.

2.46.150 Arbitration without mediation.

2.46.160 Arbitration – Process.

2.46.170 Arbitration – Determination.

2.46.180 Arbitration – Determination final – Conditions.

2.46.190 Determination – Applicability.

2.46.200 Standards of reasonableness to be applied to rent increases.

2.46.210 Violation of housing standards.

2.46.220 Services.

2.46.230 Notices.

2.46.240 Tenant remedies.

2.46.250 Retaliation.

2.46.260 Expiration.

2.46.010 Definitions.

A. "Capital Improvements" means those improvements which directly and primarily benefit and serve the existing mobile home park tenants by materially adding to the value of the mobile home park, appreciably prolonging its useful life, or adapting it to new uses, and which are required to be amortized over the useful life of the improvement pursuant to the provisions of the Internal Revenue Code and the regulations issued pursuant thereto. "Capital improvement costs" means all costs reasonably and necessarily related to the planning, engineering and construction of capital improvements and shall include debt service costs, if any, incurred as a direct result of the capital improvements.

B. "Commission" means commissioners of the mobile home rent review commission established by Section 2.46.030.

C. "Commissioners" means commissioners of the mobile home rent review commission.

D. "Debt service costs" means the periodic payment or payments due under any security or financing device which is applicable to the mobile home park including any fees, commission, or other charges incurred in obtaining such financing.

E. "Designated representative" means a person appointed in writing by an owner, a tenant, or a group of tenants and authorized to represent the interests of, negotiate on behalf of, and bind the appointing party.

F. "Filing" means actual receipt of the item being filed by the person designated in this chapter to receive the item, or by his or her designee.

G. "Homeowner" means a person who has a tenancy in a mobile home park under a rental agreement.

H. "Maintenance and operation costs" means all expenses, exclusive of costs of debt service, costs of capital improvements, and costs of rehabilitation, incurred in the operation and maintenance of the mobile home park, including but not limited to: real estate taxes, business taxes and fees, insurance, sewer service charges, utilities, janitorial services, professional property management fees, pool maintenance, exterior building and grounds maintenance supplies, equipment, refuse removal, elevator service, and security services of systems.

I. "Mobile home park owner" or "owner" means the owner, lessor, operator or manager of a mobile home park.

J. "Mobile home tenant" or "tenant" means any person legally occupying a mobile home dwelling unit pursuant to ownership thereof or a rental or lease arrangement with the owner thereof.

K. "Rehabilitation costs" means the costs of any rehabilitation or repair work done on or in a mobile home park or directly servicing a mobile home park, and which work was done in order to comply with an order issued by an governmental agency, regulatory board or public utility or to repair or prevent damage resulting or which may result from fire, earthquake, or other natural disaster.

L. "Rent" means the consideration, including any bonus, benefits or gratuity, demanded or received in connection with the use and occupancy of a mobile home space in a mobile home park, or for the transfer of a lease for park space, services and amenities, subletting and security deposits, but exclusive of any amounts paid for the use of the mobile home dwelling unit.

M. "Rent increase" means any additional rent demanded or paid by a tenant for a rental unit, including any reduction or elimination in services without a corresponding reduction in the moneys demanded or paid for rent.

N. "Rental agreement" means an agreement between an owner and a homeowner establishing the terms and conditions of a park tenancy. A lease is a rental agreement.

O. "Rental space" means a space or lot rented in a mobile home park or offered for rent in the city of Rocklin for the purposes of occupancy by a mobile home with all services connected with the use or occupancy thereof.

P. "Services" means those facilities which enhance the use of the rental lot or space, including, but not limited to, repairs, replacement, maintenance, painting, heat, hot and cold water, utilities, security devices, laundry facilities and privileges, janitorial service, refuse removal, telephone service, and recreational and other facilities in common areas of the mobile home park in which the spaces or lots are located.

Q. "Tenancy" means the right of a homeowner to the use of a rental space within a mobile home park on which to locate, maintain, or occupy a mobile home, site improvements, and accessory structures for human habitation, including the use of the services and facilities of the park. (Ord. 533 § 1, 1985; Ord. 529 § 3 (part), 1985).

2.46.020 Applicability.

The provisions of this chapter shall not apply to any mobile home park which contains fewer than ten spaces. (Ord. 529 § 3 (part), 1985).

2.46.030 Rent review commission.

A. There is created within the city a mobile home rent review commission, consisting of five members, the membership of which shall be appointed by the city council from a list of applicants to serve at the council's pleasure.

B. Each member shall be a full-time resident within the city.

C. 1. Commissioners shall serve for terms of two years, except that, of those members first appointed by the council, three members shall be appointed for terms of one year and two members shall be appointed for terms of two years.

2. A. member chosen to fill a vacancy created other than a expiration of a term shall be appointed for the unexpired term of the member who he or she is to succeed. A member of the comission shall be eligible for reappointment. A vacancy in the commission shall not impair the rights of the remaining members to exercise the powers of the commission. Three members shall constitute a quorum. Three affirmative votes are required for a ruling or decision.

D. The city council shall appoint, for a two-year term, an alternate commissioner in the same manner provided by this section. The alternative commissioner shall serve as a commissioner in the event that a regular member is unable to attend or participate because of absence or conflict of interest. In the event a regular member submits to the city manager a written notice stating that the member will be unable to attend a specific meeting or participate in specific issues because of an absence or conflict of interest, the city manager shall immediately request the alternate to serve in that member's place. The alternate, when sitting as a commission member, shall have the same powers as a regular commission member.

E. Commission members who are tenants, owners or employees of a mobile home park, or who are related

in the first degree by blood or marriage to a tenant, owner or employee of a mobile home park, shall not act upon or participate in any decision which will affect the rents in such mobile home park. (Ord. 529 § 3, (part), 1985).

2.46.040 Duties and powers of the commission.

Within the limitations provided by law, the commission shall have the following duties and powers:

A. To meet one time a year or more often if requested by the chair or the city manager. The commission may utilize the city staff and offices and/or facilities as needed;

B. To select a chair and vice chair for a term of one year;

C. To select arbitrators upon request of the city manager;

D. To make or conduct such independent hearings or investigations as may be appropriate to obtain such information as is necessary to carry out their duties;

E. To render at least annually a comprehensive written report to the city council concerning the application and enforcement of this chapter, the results of mediations and arbitrations, proposed amendments to this chapter, and all other matters pertinent to this chapter which may be of interest to the council. (Ord. 529 § 3 (part), 1985).

2.46.050 Increases subject to review – Exceptions.

A. Except as provided in subsection B of this section any rent increase occurring after January 1, 1985, shall be subject to this chapter.

B. The following rent increases shall be exempt from review under this chapter:

1. Any rent increase, taken together with any increase which took effect in the twelve-month period immediately preceding the date the increase is noticed, which is equal to or less than the rent charged on the date twelve months prior to the date the increase is noticed, multiplied by a cost of living factor and rounded off to the nearest dollar. The cost of living factor shall be as follows:

1.00 (CPI/C)	where CPI/C is equal to or less than five percent;
.75 (CPI/C)	or five percent, whichever is greater, where CPI/C is greater than five percent and equal to or less than ten percent;
.66 (CPI/C)	or seven and a half percent, whichever is greater, where CPI/C is greater than ten percent.

"CPI/C" means the percent change in the consumer price index for California, All Urban Consumers, as published by California State Department of Industrial Relations, Division of Labor Statistics and Research, over the twelve months preceding the date notice of the rent increase is given. The most recently published CPI figure available at the time the rent increase notice is given shall be used for the calculation;

2. Rent increase of up to ten percent or twenty dollars, whichever is less, following the voluntary termination of a tenancy on the part of a home owner. A voluntary termination of a tenancy shall not include situations where the vacancy arises from the owner issuing a sixty-day notice to vacate to the prior homeowner, except as set forth in subdivision 3 of this subsection;

3. Rent increases of up to ten percent or twenty dollars, whichever is less, following a termination of a tenancy occurring because of the eviction of the homeowner for a material violation of a written rental agreement;

4. Rent increases in any mobile home park consistent with a written rental agreement entered into by the owner and homeowners with tenancies in more than fifty percent of the rental spaces located in the park. The written rental agreement shall specify the rent to be charged each space and shall be for a single specified term. Except for the dollar amount of the rent to be charged, the rental agreement shall be uniform for each space and must be offered in good faith to all tenants in the mobile home park. The rental agreement must be executed by the owner and the individual homeowners. This exemption shall apply during the term of the agreement. Rent increases consistent with the written rental agreement shall be rent increases up to and including the rent authorized in the written rental agreement. (Ord. 533 §§ 2-4, 1985; Ord. 529 § 3 (part), 1985).

2.46.060 Limitations on rent increases.

The rent on any rental space shall not be increased more than one time in any twelve-month period, except as allowed in Section 2.46.050.B2, 3 and 4; provided, that a petition for a rent increase may be allowed within twelve months of the date notice of the preceding rent increase was given where the owner can clearly demonstrate that the rent increase is necessary to cover costs of capital improvements or rehabilitation that could not have been reasonably foreseen at the time notice of the preceding rent increase was given. The facts supporting the necessity shall be included in the petition, and the question of the necessity shall be considered and decided by the mediator and/or arbitrator. (Ord. 529 § 3 (part), 1985).

2.46.070 Petitions for rent review – Owners.

Any owner whose rental spaces are subject to the provisions of this chapter and who seeks to increase the rent of any space or spaces in a manner or by an amount subject to review under this chapter shall file a petition with the city manager. The owner shall at the same time notify, in writing, all tenants subject to such rental increase, shall include in his petition a list of names and addresses of all such tenants, and shall place a copy of the petition at a centralized location in the mobile home park and at the Rocklin public library for inspection and copying by the tenants. In addition, if twenty-five or more tenants have a designated representative, the owner shall provide a copy of the petition to the designated representative. Except as provided in Section 2.46.060, no

more than one petition for a rent increase shall be permitted for any one mobile home park in any one year. (Ord. 529 § 3 (part), 1985).

2.46.080 Petitions for rent review – Tenants.

Any tenant who is subject to a rent increase which (s)he believes is in violation of this chapter may file a petition with the city manager. The petition shall be processed in the same manner as provided herein for owner petitions. The tenant shall provide the owner with a copy of the petition at the same time that it is filed with the city manager. (Ord. 529 § 3 (part), 1985).

2.46.090 Petition – Form.

A petition for rent review must be filed with the city manager on the form prescribed by the city and must be accompanied by such supporting material as is necessary to clearly support the request. The petition shall contain the following certification: "I certify under penalty of perjury that the foregoing is true and correct." The petition shall be dated and subscribed by the petitioner and the place of execution shall be specified. An owner's petition shall include a copy of the owner's notice of rent increase and a list of the tenants subject to the proposed increase. A tenant's petition alleging service reductions shall clearly set out the factual grounds of the allegations. The burden of proof regarding service reductions shall be on the petitioner. (Ord. 529 § 3 (part), 1985).

2.46.100 Petition – Time of filing.

A. An owner's petition must be filed no later than sixty days prior to the proposed effective date of the increase stated in the notice to tenants.

B. A tenant's petition shall be filed no later than fifteen working days after receipt of notice of rent increase from the owner or after a reduction in service occurs, whichever is applicable. (Ord. 529 § 3 (part), 1985).

2.46.110 Petition – Effect of timely filing.

Upon filing of a timely and completed petition, that portion of the requested rental increase (and only that portion) which exceeds the amount determined under Section 2.46.050.B1 shall not take effect unless and until such time as the mediator or arbitrator allows such increase or portion thereof pursuant to the provisions of this chapter. That portion equal to the amount determined under Section 2.46.050.B1 shall be allowed to take effect as noticed. (Ord. 529 § 3 (part), 1985).

2.46.120 Mediation.

A. Upon receipt of a timely filed and completed petition, the city manager shall refer the petition to a mediator selected by the city manager.

B. The mediator shall review the petition and shall meet at least twice during the following thirty working day period with the owner and the affected tenants, and/or their designated representative, in an effort to resolve the dispute by mutual agreement. At the option of the

mediator. The mediator may choose to meet only with designated representatives of the owner and the tenants.

C. Upon request of the mediator, the parties shall provide any information that is reasonably available that the mediator deems necessary to resolve the dispute. Failure to provide the requested information may be deemed a refusal to mediate in good faith. All information submitted shall be in writing and shall be certified in the same manner as set forth in Section 2.46.090.

D. In the event that the parties agree to a specific rental increase, the mediator shall prepare a memorandum of agreement so specifying between the owner and the affected tenants. The memorandum of agreement shall be executed by the owner and the affected tenants, or their designated representatives. If the mediation process fails to establish a mutually agreed amount of rental increase within thirty days, or sooner as hereinafter provided, the mediator shall request a best offer from each party, shall prepare a written report on the mediation process which includes all documentation presented, and shall make a determination as to a reasonable rent increase. At any time during the mediation process, the mediator may determine that there is an impasse, a substantial failure to mediate in good faith on the part of either party, or that further mediation is impractical or not likely to be of further value, in which event the mediator shall issue a factfinding report and a recommendation for a reasonable rent increase. The report and recommendation shall be submitted to the city manager who shall mail copies to the parties. (Ord. 529 § 3 (part), 1985).

2.46.130 Mediation-Decision-Finality.

A. In the event an agreement is not reached under Section 2.46.120 and the mediator determines that all or a portion of the proposed rent increase is reasonable under the circumstances, the mediator shall approve all or such portion of the rent increase determined to be reasonable, which increase shall become immediately effective as of the time for which it was originally noticed, unless a request for arbitration is timely filed. The amount of the approved rent increase shall be included in the mediator's report and recommendation.

B. If no request for arbitration is timely filed, the mediator's decision shall be final. If a request for arbitration is timely filed, the rent increase determined by the mediator to be reasonable shall not become effective unless and until approved through arbitration. (Ord. 529 § 3 (part), 1985).

2.46.140 Request for arbitration.

A request for arbitration of the amount of the increase allowed or disallowed by the mediator may be made either by the owner or by the homeowners with tenancies in more than fifty percent of the rental spaces in the affected mobile home park. A request for arbitration shall be made by filing the request in writing with the city manager no later than seven working days after the postmarked date that the mediator's report and recommendation is mailed to the parties under Section 2.46.120. Requests for arbitration by homeowners shall include the name and signature and rental space number(s) of each

homeowner participating in the request for arbitration. (Ord. 533 § 5, 1985; Ord. 529 § 3 (part), 1985).

2.46.150 Arbitration without mediation.

Upon the mutual request of the parties to a rent increase dispute, a petition may be referred directly to arbitration without mediation. Such a request must be in writing, signed by all parties, or their representatives, and filed with the city manager prior to selection of a mediator under Section 2.46.120. (Ord. 529 § 3 (part), 1985).

2.46.160 Arbitration – Process.

A. Upon receipt of a timely and completed request for arbitration, the city manager shall refer the petition to arbitration.

B. An arbitrator shall be appointed in the following manner.

1. Any interested person may submit to the city manager a list of nominees. The nominees shall be experienced professional arbitrators with particular expertise in rental dispute mediation or with experience or training showing the capabilities to deal with the issues found in the rental dispute. The lists of nominees shall include the resumes of each detailing their qualifications or deal with the issues found in the rental dispute. To be eligible for nomination, the arbitrator shall not own a real estate interest in a mobile home park, shall not be a tenant of a mobile home park, and shall not be a employee, officer,

member or otherwise affiliated with a group or organization which has or is viewed by a significant number of owners or tenants as having taken advocacy positions in rent control matters. The city manager shall review the lists, conduct such investigation and/or interviews as (s)he deems necessary, and refer the lists to the commission.

2. The commission shall review the lists, shall conduct such investigations and/or interviews as it deems necessary, and shall select an arbitrator. The arbitrator selected by the commission may, but need not, appear on either list submitted, but shall meet the criteria set forth in subdivision 1 of this subsection. The decision of the commission under this subdivision B2 shall be final.

C. The arbitrator shall conduct a hearing with the parties, and/or their designated representatives, within thirty days of the date the arbitrator was selected. At the option of the arbitrator, the arbitrator may choose to meet only with the designated representatives of the parties. At this hearing, the report of the mediator shall be reviewed, the concerns of each party shall be discussed, and the arbitrator shall indicate the amount and nature of further information (s)he will need from any party in order to reach a determination. All information submitted shall be in writing and shall be certified in the same manner as set forth in Section 2.46.090. The burden of proof regarding the reasonableness or unreasonableness of the rent increase shall be on the party requesting arbitration. Each party shall comply with the arbitrator's request for information within ten working days of the request. The arbitrator may proceed under this chapter

regardless of whether any party defaults in the providing of any requested information. (Ord. 529 § 3 (part), 1985).

2.46.170 Arbitration – Determination.

After review the record and any additional evidence (requested or the parties) which has been provided, the arbitrator shall determine the amount of allowable rental increase, if any, in accordance with standards of Section 2.46.060, if applicable, and Section 2.46.200, and the increase, if any, shall be effective as of the date for which it was originally noticed, unless the arbitrator imposes a different effective date as a condition of approval under Section 2.46.180. (Ord. 529 § 3 (part), 1985).

2.46.180 Arbitration – Determination final – Conditions.

The determination of the arbitrator shall be final, and shall be delivered to the city manager and the parties in writing, together with the written findings of fact supporting such determination within fifteen working days of the hearing provided in Section 2.46.160. The arbitrator's allowance or disallowance of any rent increase or portion thereof may be reasonably conditioned in any manner necessary to effectuate the purposes of this chapter. (Ord. 529 § 3 (part), 1985).

2.46.185 Costs of mediation and arbitration.

A. Where an owner petitions for mediation or requests arbitration of a proposed rent increase, the owner shall pay all costs associated with the selection and retention of the mediator or arbitrator; provided, that

if through the process of mediation or arbitration greater than eighty percent of the rent increase requested by the owner is allowed by a final decision, the owner shall be allowed to pass the cost through to the tenants, spread over a one-year period, in addition to the increase allowed.

B. Where a tenant petitions for mediation or requests arbitration of a rent increase, the tenant shall pay all costs associated with the selection and retention of the mediator or arbitrator; provided, that if through the process of mediation or arbitration greater than eighty percent of the rent reduction requested by the tenant is allowed by a final decision, the tenant shall be allowed to pass the cost through to the owner in the form of a reduction in rent, in addition to the reduction allowed, spread over a one-year period.

C.1. Costs of mediation or arbitration shall be estimated by the city manager and payment of such costs shall be made upon request of the city manager prior to final retention of the mediator or arbitrator. Failure to make payment within ten working days of the city manager's request shall be deemed a withdrawal of the petition or request for arbitration.

2. If the payment made to the city manager is insufficient to pay the full cost of the mediator or arbitrator, the party who originally made payment shall pay the difference to the city manager within ten working days of receiving notice of the amount due. If the payment made exceeds the full cost of the mediator or arbitrator, the excess shall be refunded by the city manager to the party

who made payment after the mediator or arbitrator is paid in full. (Ord. 529 § 3 (part), 1985).

2.46.190 Determination – Applicability.

No determination made under the provisions of this chapter shall be effective with respect to any rental space unless the tenant of such space is accorded all of the rights to which (s)he is entitled under this chapter. (Ord. 529 § 3 (part), 1985).

2.46.200 Standards of reasonableness to be applied to rent increases.

Mediators and arbitrators *shall* determine whether rent increases are reasonable under the circumstances, taking into consideration that the purpose of this chapter is to permit owners a fair and reasonable return while protecting tenants from arbitrary, capricious, or unreasonable rent increases in light of the mobile home housing market conditions in the Sacramento SMSA and appropriate provisions of the city's housing element. The mediator's or arbitrator's determination shall be made with reference to the following standards:

A. Increases Deemed Reasonable. Where the amount of the proposed rental increase consists only of passing through one or more of the following:

1. Costs of capital improvements;
2. Increased costs of maintenance and operation; or
3. Costs of rehabilitation:

plus no more than three percent of the monthly rent, it shall be deemed reasonable, and the mediator or arbitrator shall allow the entire rental increase; provided, that:

a. Cost figures have been established to his or her reasonable satisfaction;

b. The costs of capital improvements, if any, are averaged on a per space basis, are amortized over a period of not less than sixty months, are treated as an assessment to be paid off over not less than sixty months, and are excluded from the rent amount on which calculations of future rent increases are based;

c. The costs of rehabilitation, if any, are averaged on a per space basis, are amortized over a period not less than thirty-six months, are treated as an assessment to be paid off over not less than thirty-six months; and are excluded from the rent amount on which calculations of future rent increases are based;

d. The costs of capital improvements or rehabilitation relate only to capital improvement or rehabilitation work completed during the twelve months preceding the date notice of the rent increase is given and not to any work in progress;

e. Each of the costs proposed to be passed through to tenants, whether it be costs of capital improvements, increased costs of operation and maintenance, or costs or rehabilitation, bears a reasonable relationship to the purposes for which such costs were incurred and the value of the mobile home park, or portion thereof, to which they are applied.

B. Standards Applicable to Rent Increases Which Exceed the Foregoing.

1. In order to assure to owners a fair and reasonable return, the mediator or arbitrator shall, when the amount of any rent increase or portion thereof exceeds any of the foregoing standards under subsection A of this section, determine what is reasonable under the circumstances, taking into account all relevant factors, including the following:

a. Debt service costs due to refinancing, subject to subdivision 2 of this subsection;

b. Debt service costs due to sale, subject to subdivision 3 of this subsection;

c. The rental history of the mobile home park, including:

(i) The presence or absence of past increases.

(ii) The frequency of past rent increase.

(iii) The owner's response to any tax reduction measure.

(iv) The occupancy rate of the mobile home park in comparison to comparable units in the same general area;

d. The physical condition of the mobile home park, including the quantity and quality of maintenance and repairs performed during the last twelve months;

e. Any increases or reduction in services during the last twelve months before the effective date of the proposed rent increase;

f. Other financial information which the owner is willing to provide;

g. Existing market value of rents for spaces similarly situated.

2. In the case of a refinancing (other than a refinancing for capital improvements, the debt service costs of which are included as a capital improvement cost under Section 2.46.010A), a rent increase to cover the increased costs of debt service shall not be allowed unless not allowing the increase would place a demonstrable financial burden on the continued operation of the mobile home park. If the proposed rent increase for debt service meets this criteria, the mediator or arbitrator may allow all or part of the requested increase, taking into account the following factors:

a. The purpose of the refinancing;

b. The arms-length nature of the transaction;

c. The owner's rate of return on the investment;

d. The frequency of past resales or refinances;

e. The extent to which prior rental increases have made provisions for appreciation of asset value; and

f. Any other factors the mediator or arbitrator deems relevant.

3. In the case of increased costs of debt service due to a sale, a rent increase shall not be allowed if, at the time the property was acquired, the owner could reasonably have foreseen such increased expenses would not be covered by the rent schedule then in effect.

4. In determining an owner's fair and reasonable return, the mediator or arbitrator shall consider all relevant factors, such as the owner's investment in the mobile home park and the owner's net operating income; provided, that the determination shall not be based on the current fair market value of the mobile home park.

5. Notwithstanding any other provision to the contrary, no provision of this section or this chapter shall be applied to prohibit a mediator or arbitrator from granting a rent increase that is demonstrated to be necessary to provide the owner with a fair and reasonable return as provided by law. (Ord. 529 § 3 (part), 1985).

2.46.210 Violation of housing standards.

In any determination of what constitutes a reasonable rent increase under the circumstances, the mediator or arbitrator shall consider and weigh evidence establishing the nature and extent of any violations by either the owner or tenants of the city building and housing codes. any rent increase may be disallowed, reduced, or made subject to reasonable conditions, depending on the severity of such violations. (Ord. § 3 (part), 1985).

2.46.220 Services.

During the term of operation of this chapter, no owner shall reduce or eliminate any service to any rental space unless a proportionate share of the cost savings, due to such reduction or elimination, is simultaneously passed on to the tenant in the form of a decrease in existing rent or a decrease in the amount of a rent

increase otherwise permitted by this chapter. (ord. 529 § 3 (part), 1985).

2.46.230 Notice.

Sixty days prior to any increase in rents, the owner shall provide the tenant with written notice stating the current rent, any rent increase allowed by this chapter, and the amount of rent due. A copy of the notice shall be provided to the city manager at the same time. (Ord. 529 § (part), 1985).

2.46.240 Tenant remedies.

A. If notice required by Section 2.46.230 is not provided, the tenant may withhold the rent increase until such notice is provided.

B. In any action for recovery of rent or for unlawful detainer based on nonpayment of rent, the tenant may defend the action on the ground that the amount of rent claimed is in excess of the rent allowed by this chapter.

C. Nothing in this section is intended to limit or preclude any other lawful defense, cause of action action or claim of the tenant. (Ord. 529 § 3 (part), 1985).

2.46.250 Retaliation.

A. No owner shall in any way retaliate against any tenant for the tenant's assertion or exercise of any right under this chapter. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and

attorney's fees. Such retaliation shall also be an available defense in an unlawful detainer action.

B. No tenant shall in any way retaliate against any owner for the owner's assertion or exercise of any right under this chapter. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees. (Ord. 529 § 3 (part), 1985).

2.46.260 Expiration.

Unless extended by further council action, this chapter shall expire and have no force and effect on and after July 1, 1987. (Ord 547 § 1, 1986; (rd. 529 § 3 (part), 1985).

Supreme Court, U.S.
FILED
JUN 29 1992
OFFICE OF THE CLERK

(2)

No. 91-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF ROCKLIN, THE ROCKLIN MOBILE HOME RENT REVIEW COMMISSION; CARLOS URRUTIA; RUSTY SELIX, RUDOLF MICHAELS; GEORGE PARAS,

Petitioners,

v.

SIERRA LAKES RESERVE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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July 1, 1992

*Application for Admission Pending

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a case is ripe for review by writ of certiorari when the Court of Appeals has remanded the case to the District Court for further proceedings, and the District Court has not yet had the opportunity to consider the effect of this Court's decision in *Yee v. City of Escondido,* 112 S.Ct. 1522 (1992), upon one of several claims asserted in the case.

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No. 91-1925

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OCTOBER TERM, 1991

CITY OF ROCKLIN, THE ROCKLIN MOBILE HOME RENT REVIEW COMMISSION; CARLOS URRUTIA; RUSTY SELIX, RUDOLF MICHAELS; GEORGE PARAS,

Petitioners,

v.

SIERRA LAKES RESERVE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

JURISDICTION

Jurisdiction may not be present in that the petition may be untimely. The petition filed on May 1, 1992 was not in proper form, and the amended petition was not filed within 90 days after the Court of Appeals denied petitioners' suggestion for rehearing *en banc.*

STATEMENT OF THE CASE

Respondent Sierra Lakes Reserve ("Sierra Lakes") owns a mobilehome park in the City of Rocklin. All mobilehome parks in the City of Rocklin are subject to rent control. App. to Pet. for Cert., pp. 58-82. The gravamen of Sierra Lakes' complaint is that

petitioners City of Rocklin *et. al.* ("City") engaged in a pattern of arbitrary conduct with respect to the processing of Sierra Lakes' rent increase applications, thereby depriving respondent of due process and equal protection of the law, in violation of 42 U.S.C. section 1983. App. to Pet. for Cert., pp. 16-18. As a separate and distinct claim, Sierra Lakes also alleges that the operation of the City's rent control ordinance constituted an unconstitutional "taking" of Sierra Lakes' property, similar to that found by the Court of Appeals for the Ninth Circuit in *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1987). App. to Pet. for Cert., pp. 9-12.

In an unpublished order, the United States District Court granted the City's motion to dismiss Sierra Lakes' entire complaint. App. to Pet. for Cert., pp. 24-57. Although the District Court recognized it was bound by the principles of *stare decisis* to follow the Court of Appeals' decision in *Hall v. City of Santa Barbara,* it nevertheless dismissed Sierra Lakes' "taking" claim on ripeness grounds, because Sierra Lakes had not exhausted its state court remedies before seeking relief in federal court. App. to Pet. for Cert., pp. 34-39.

In a published opinion reported at 938 F.2d 951 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit reversed the order of the District Court as to Sierra Lakes' due process, equal protection, and "taking" claims. App. to Pet. for Cert., pp. 2-22. With respect to the "taking" claim, the Ninth Circuit found that Sierra Lakes' claims were ripe, due to the demonstrated inability of California property owners to obtain just compensation in several similar cases. App. to Pet. for Cert., pp. 7-9. On February 3, 1992 the Court of Appeals denied petitioners' suggestion for rehearing *en banc.* App. to Pet. for Cert., p. 23. Approximately two months later, on April 1, 1992, this court issued its opinion in *Yee v. City of Escondido,* effectively overruling the Court of Appeals' decision in *Hall v. City of Santa Barbara.*

No further proceedings have taken place in the District Court or in the Court of Appeals, and neither court has had an opportunity to apply *Yee v. City of Escondido* to this case.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari is premature. The Court of Appeals has remanded this case to the District Court for further proceedings. The District Court has not yet had an opportunity to apply this Court's ruling in *Yee v. City of Escondido* to this case. It is possible that the District Court will dismiss Sierra Lakes' "taking" claim, in which event petitioners would have no basis for seeking review in this Court.

In similar circumstances, this Court has stated that a petition for a writ of certiorari was premature "because the Court of Appeals remanded the case, [and it] is not yet ripe for review." *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.,* 389 U.S. 327, 328 (1967). The same logic requires that the petition in this case be denied.

In addition, Sierra Lakes has asserted due process and equal protection claims that are unaffected by this Court's ruling in *Yee v. City of Escondido.* The Court of Appeals has ruled that Sierra Lakes may proceed with its equal protection and due process claims. App. to Pet. for Cert., pp. 16-18. There is no reason why adjudication of Sierra Lake's other claims should be delayed by petitioners' premature request for a writ of certiorari in this Court.

Finally, it should be noted that petitioners' argument is misleading in at least two respects. First, petitioners imply that the Court of Appeals intentionally failed to follow this Court's ruling in *Yee v. City of Escondido.* To the contrary, *Yee v. City of Escondido* was decided on April 1, 1992, almost two months after the Court of Appeals refused the suggestion for rehearing *en banc.*

Second, the issue before the Court of Appeals with respect to Sierra Lakes' "taking" claim was not whether the City's ordinance resulted in a "taking" of Sierra Lakes' property, but only whether a "taking" claim is ripe for review where a property owner has demonstrated an inability to obtain just compensation in the state courts. App. to Pet. for Cert., p. 9. Since this general

proposition of law remains valid even after *Yee v. City of Escondido,* there is no reason to grant the petition for a writ of certiorari.

Because the District Court is clearly capable of applying this court's decision in *Yee v. City of Escondido* to Sierra Lakes' "taking" claim, while at the same time allowing Sierra Lakes to proceed with its due process and equal protection claims, the petition for a writ of certiorari should be denied.

Dated: July 1, 1992

Respectfully submitted,

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*Application for Admission Pending